apparently not reported up to 151 U.S.

145 U.S. 688

No. 1559

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1891.

No. 12.

MARY E. POST, ADMINISTRATRIX OF ESTATE OF A. T. POST, DECEASED, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF PULASKI.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 25, 1892.

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a In the United States Circuit Court for the Southern District of Illinois.

MARY E. POST, Administratrix of the Estate of Augustus T. Post, Deceased,
vs.
COUNTY OF PULASKI. } Assumpsit.

1 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States of America for the southern district of Illinois, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between Mary E. Post, administratrix of the estate of Augustus T. Post, deceased, plaintiff, and The County of Pulaski, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Mary E. Post, administratrix of the estate of Augustus T. Post, deceased, as by her complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the seventh circuit, together with this writ, so that you may have the same at Chicago on the first Monday of October next, in the said United States circuit court of appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Spring-
[SEAL.] field, in said southern district of Illinois, this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth year.

JAMES T. JONES, *Clerk.*

Filed September 28, 1891.

JAMES T. JONES, *Clerk.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. William J. Allen, district judge of said district, and, in the absence of the Hon. Walter Q. Gresham,
2 judge of the seventh judicial circuit, on Thursday, the twenty-seventh day of August, in the year of our Lord one thousand

eight hundred and ninety-one, and of our Independence the one hundred and sixteenth year.

JAMES T. JONES, *Clerk.*

MARY E. POST, Administratrix of Estate of August T. Post, Deceased, *vs.* COUNTY OF PULASKI. } Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS:

Be it remembered that heretofore, to wit, on the twenty-third day of May, in the year of our Lord one thousand eight hundred and eighty-nine, came Augustus T. Post, a citizen of the State of New York, plaintiff, by Messrs. Connolly & Mather, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois a precipe for summons against The County of Pulaski, located in said southern district of Illinois, defendant; which said precipe is as follows, to wit:

CIRCUIT COURT UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

June Term, A. D. 1889.

AUGUSTUS T. POST *vs.* THE COUNTY OF PULASKI. } In Assumpsit. Damages, $7,500.

The clerk will issue summons in the above-entitled cause, directed to the marshal of said district to execute.

CONNOLLY & MATHER,
Plaintiff's Att'ys.

Springfield, May 22, 1889.

Afterwards, to wit, on the said twenty-third day of May of the year last aforesaid, a summons was issued in said case as prayed for; which said summons, together with the return of the marshal thereon, is as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon the county of Pulaski, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto Augustus T. Post of a plea of assumpsit to his damage, as he alleges, of $7,500, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this 23d day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and thirteenth year.

[SEAL.]

JAMES T. JONES, *Clerk.*

I have served the within writ by reading the same to E. W. McCelland, county clerk of the within-named county of Pulaski, on the 24th day of May, A. D. 1889, at Mound City, Illinois, and also by delivering to the said E. W. McCleland, county clerk of the said county of Pulaski, a true copy of this writ at Mound City, Illinois, on the 24th day of May, A. D. 1889.

H. G. WEBER, *U. S. Marshal,*
By JOHN SCHNEIDER, *Deputy.*

(Indorsed:) Filed May 27, 1889. James T. Jones, clerk.

Then, afterwards, to wit, on the twenty-fourth day of May, of the year last aforesaid, came again the plaintiff, by his said attorneys, and filed in the clerk's office of said court his declaration in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Illinois.

In Circuit Court, January Term, A. D. 1891.

Augustus T. Post, who is a citizen of the State of New York and resident therein, plaintiff, by Connolly & Mather, his attorneys, complains of The County of Pulaski, a body politic and corporate organized and existing under the laws of the State of Illinois and located in said southern district, the defendant, of a plea of trespass on the case on promises, for that whereas heretofore, to wit, on the seventeenth day of October, eighteen hundred and seventy-two, at, to wit, said district, and being authorized thereto by the provisions of an act of the legislature of the State of Illinois entitled "An act to incorporate the Cairo & Vincennes Railroad Company," approved March
4 6, 1867, and by the provisions of an act to amend said first-named act, approved February 9, 1869, and also by the provisions of an act entitled "An act to fund and provide for the payment of the railroad debts of counties, townships, cities, and towns," approved April 16, 1869, and pursuant to an order of the county court of said county and authorized by a majority of the legal votes cast at an election held in said county pursuant to law on the 5th day of November, A. D. 1867, made, executed, and delivered to the Cairo & Vincennes Railroad Company, amongst others, its certain thirty railroad aid bonds in writing and were all in the words and figures following:

UNITED STATES OF AMERICA.

Number 172. Dollars, 500.

Pulaski County Bond.

County of Pulaski. *State of Illinois.*

Know all men by these presents that the county of Pulaski, in the State of Illinois, acknowledges itself indebted to the Cairo & Vincennes Railroad Company or bearer in the sum of five hundred dollars; which sum the said county promises to pay said company or bearer in the city of New York twenty years after date, with interest thereon from and after November 1st, 1872, at the rate of eight per cent. per annum, payable half yearly on the first days of January and July of each year (except the last coupon, which is payable with this coupon) on the presentation and surrender, at the place in the said city of New York where the treasurer of the State of Illinois pays the interest and debt of said State, of the coupons hereto attached. This bond is one of two hundred of like tenor and amount of the same issue, and is issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county, pursuant to law, on the 5th day of November, A. D. 1867. This bond is also issued under the provisions of an "Act to incorporate the Cairo & Vincennes Railroad Company," approved March 6th, 1867, and under the provisions of an act to amend said act, approved February 9th, 1869; also under the provisions of an act entitled "An act to fund and provide for the payment of the railroad debts of counties, townships, cities, and towns," approved April 16th, 1869, and is in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company in the total sum of one hundred thousand dollars.

In testimony whereof the said county of Pulaski has executed this bond by the county judge of said county, under the order of the county court, signing his name hereto and by the clerk of said court, under the order thereof, attesting the same and affixing hereto the seal of said court.

This done, at the office of the clerk of said court, this seventeenth day of October, A. D. 1872.

GEORGE S. PIDGEON,
County Judge, Pulaski County, State of Illinois.

Attest: E. B. WATKINS,
Clerk of the County Court of Pulaski County, Illinois.

[Seal County Court.]

And plaintiff avers said bonds were numbered respectively as follows: 3, 16, 17, 18, 61, 62, 63, 64, 79, 80, 87, 88, 89, 108, 126, 133, 134, 136, 135, 137, 172, 173, 174, 175, 176, 177, 178, 179, 180, and 181; that they were and are each and all fac-similes of each other excepting said bond numbers thereon.

And plaintiff avers that at, etc., on, etc., aforesaid, defendant, authorized by said laws, order, and vote, also made, executed, and delivered to said railroad company, amongst others, its certain one hundred and ninety-six interest coupons, in writing, attached to said thirty bonds and being for the semi-annual interest thereon, each signed by the county clerk of said county, and, except the bond numbers thereon and dates when due, each one being in the words and figures following, to wit:

The county of Pulaski will pay to bearer, at the place in the city of New York where the treasurer of the State of Illinois pays interest on the State debt, the sum of twenty dollars on the first day of ——, 18—, being six months' interest on bond No. —.

E. B. WATKINS,
County Clerk.

Whereby plaintiff further avers defendant became liable to pay bearer the sum of money in each of said coupons mentioned at the maturity thereof, according to its tenor and effect, and, being so liable, defendant then, to wit, November 17, 1872, at, to wit, said district, promised to pay the bearer of each of said coupons at the maturity thereof the sum of money therein mentioned.

And plaintiff further avers that he afterwards, to wit, on the first day of January, 1884, at, to wit, New York, for value, in the usual course of his business and without notice of any defense thereto, became the owner and holder of said one hundred and ninety-six coupons and is now the owner and bearer thereof, whereby defendant became liable to pay plaintiff said sums in said coupons mentioned,

and, being so liable, did, on, to wit, the day and year last afore-
6 said, at, to wit, said district, promise plaintiff to pay him the said sum of money in each of said coupons mentioned, at the date of its respective maturity, according to its tenor and effect.

And plaintiff avers that each and all of said 196 coupons became, was, and were due long before the bringing of this suit, as follows: One coupon of said bond No. 3 fell due on each of the following dates, viz: The first days of January and July of the years 1885, 1886, 1886, 1887, and 1888, respectively; a coupon of each of said bonds 16, 17, and 18 fell due July 1, 1886, January and July 1, 1888, January and July 1, 1888, and January 1, 1889, respectively; a coupon of each of said bonds 61, 62, 63, and 64 fell due July 1, 1886, January and July 1, 1887, January and July 1, 1888, and January 1, 1889; one coupon of said bond No. 79 became due on each of the following dates: January 1, 1885, January and July 1, 1886, January and July 1, 1887, and January and July 1, 1888, respectively; a coupon of each of said bonds 87, 88, and 89 became due July 1, 1886, January and July 1, 1887, January and July 1, 1888, and January, 1889; one coupon of said bond 80 fell due on each of the following dates, to wit: July 1, 1885, January and July 1, 1886, January and July 1, 1887, and January and July 1, 1888; one coupon of said bond 108 became due on each of the following dates, to wit: July 1, 1885, January and July 1, 1886, January and July 1, 1887, and January and July 1, 1888; a coupon of said bond 126

became due on each of the following dates, viz: July 1, 1886, January and July 1, 1887, January and July 1, 1888, and January 1, 1889; a coupon of each of said bonds 133, 134, 135, 136, and 137 became due on each of the following dates, viz: July 1, 1886, January and July 1, 1887, January and July 1, 1888, and January 1, 1889; and a coupon of each of said bonds 172, 173, 174, 175, 176, 177, 178, 179, 180, and 181 became due on each of the following dates, viz: January 1, 1885, July 1, 1886, January and July 1, 1887, January 1, 1889.

Notwithstanding the same being long past due and demand made for payment thereof, defendant has neglected and refused and does still neglect and refuse to pay plaintiff said sums of money in said coupons mentioned or any part thereof, to damage of plaintiff $7,500; wherefore he sues by his attorneys, Connolly & Mather; and whereas also the said defendant afterwards, to wit, on the *the* first day of January, in the year of our Lord one thousand eight hundred and seventy-two, in said district, became and was indebted to the said plaintiff in the further sum of seven thousand dollars of lawful money of the United States of America for money before that time lent and advanced by said plaintiff to the said defendant and at the special instance and request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like special instance and request of the said defendant; and in the like sum for other money by the said defendant before that time
7 had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and in like sum for goods, wares, and merchandise before that time sold and delivered by the said plaintiff to the said defendant at the like special instance and request of the said defendant; and in the like sum for price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on day and year aforesaid and at place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested; and whereas also the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of seven thousand dollars of like lawful money as aforesaid, and, being so found in arrear and indebted to the said plaintiff, the defendant, in consideration thereof, afterwards, to wit, on the

day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc., to wit, on the day when the said note became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit, at the place last aforesaid) has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the defendant has hitherto wholly neglected and refused and still does refuse and neglect, to the damage of said plaintiff of seven thousand five hundred dollars, and therefore the said plaintiff brings suit, etc.

CONNOLLY & MATHER,
Plaintiff's Attorneys.

(Indorsed:) Filed May 24, 1889. James T. Jones, clerk.

8 *Copy of Instruments and Accounts Sued On.*

20. 20.

The county of Pulaski will pay to bearer, at the place in the city of New York where the treasurer of the State of Illinois pays interest on the State debt, *in* the sum of twenty dollars on the first day of January, 1888, being six months' interest on bond No. 3.

E. B. WATKINS,
County Clerk.

Coupons sued are 8 c'p's of bond No. 3; 18 c'p's of bonds No. 16, 17, and 18; 14 c'p's of bonds No. 61, 62, 63, and 64; 8 c'p's of bond No. 79; 7 c'p's of bond No. 80; 18 c'p's of bonds No. 87, 88, and 89; 7 c'p's of bond No. 108; 6 c'p's of bond No. 126; 30 c'p's of bonds No. 133, 134, 135, 136, and 137; 70 c'p's of bonds No. 172, 173, 174, 175, 176, 177, 178, 179, 180, and 181.

The County of Pulaski to Augustus T. Post, Dr.

To goods, wares, and merchandise sold and delivered	$7,500
To money lent and advanced	7,500
To money paid, laid out, and expended	7,500
To money had and received to and for the use of said pl'ff	7,500
To money due for interest and forbearance	7,500
To labor, services, and material	7,500
To balance due on account stated	7,500

(Indorsed:) Filed May 24, 1889. James T. Jones, clerk.

Afterwards, to wit, on the 6th day of January, in the year of our Lord one thousand eight hundred and ninety, came the defendant, by Lewis M. Bradley, its attorney, and filed in the office of the clerk of the circuit court of the United States for said district its plea herein; which said plea is as follows, to wit:

UNITED STATES OF AMERICA, } ss:
State of Illinois, }

In the United States Circuit Court, Southern District of Illinois, January Term, A. D. 1890.

THE COUNTY OF PULASKI } Assumpsit.
ats. }
AUGUSTUS T. POST. }

And the defendant, by Lewis M. Bradley, its attorney, comes and defends the wrong and injury complained of in plaintiff's
9 declaration filed in above cause and says that it did not promise in manner and form as the plaintiff has thereof complained in his said declaration against it; and of this it puts itself upon the country, etc.

LEWIS M. BRADLEY,
Attorney for Defendant.

STATE OF ILLINOIS } ss:
County of Pulaski, }

Lewis M. Bradley, State's attorney for said county of Pulaski, being duly sworn, deposes and says that the above plea is true, and that he is informed and believes that the instruments sued on in above-entitled cause were not duly executed (as set forth in plaintiff's declaration) by the above-named defendant.

LEWIS M. BRADLEY,
Attorney for Def't.

Subscribed and sworn to before me this Jan. 2d, 1890.

____ ____,
Circuit Clerk, Pulaski County, Ill.

Then, afterwards, to wit, on the 19th day of June, in the June term of said court, in the year of our Lord one thousand eight hundred and ninety-one, the following proceedings were had in said court in said cause and entered of record, to wit:

AUGUSTUS T. POST } Assumpsit.
vs. }
COUNTY OF PULASKI. }

This day come Messrs. Connolly & Mather and suggest to the court the death of the plaintiff, and, on their motion, Mary E. Post, administratrix of the estate of Augustus T. Post, deceased, is substituted party plaintiff in the place and stead of said decedent.

Then, afterwards, to wit, on said 19th day of June, came the parties, by their attorneys, and filed in the clerk's office of said court a stipulation to try this case without the intervention of a jury; which stipulation is as follows, to wit:

In the Circuit Court of the United States, Southern District of Illinois.

AUGUSTUS T. POST
v.
COUNTY OF PULASKI. } Assumpsit.

It is hereby stipulated that this case be submitted to the court for trial without the intervention of a jury.

L. M. BRADLEY,
Attorney for Defendant.
CONNOLLY & MATHER,
Attorneys for Plaintiff.

10 Now, then, afterwards, to wit, on the said 19th day of June, in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

MARY E. POST, Administratrix of Estate of Augustus T. Post, Deceased,
v.
COUNTY OF PULASKI. } Assumpsit.

This day comes as well the plaintiff, by Messrs. Connolly & Mather, her attorneys, as the defendant, by L. M. Bradley, its attorney, and the plea joined is tried by the court, a jury being waived by stipulation in writing, and, the evidence being heard, the further trial of this case is postponed until to-morrow morning.

Afterwards, to wit, on the 20th day of June, in the term and year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

MARY E. POST, Administratrix of the Estate of Augustus T. Post, Deceased,
vs.
COUNTY OF PULASKI. } Assumpsit.

This day come again the parties, by their attorneys, and the court, having heard the arguments of counsel, takes this case under advisement.

And afterwards, to wit, on the 27th day of August, in the June term of said court, in the year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

MARY E. POST, Administratrix of the Estate of August T. Post. Deceased,
vs.
COUNTY OF PULASKI. } Assumpsit.

This day come again the parties, by their attorneys, and the court, being now sufficiently advised in the premises, finds the issues for

the defendant. It is therefore adjudged by the court that the defendant recover of the plaintiff the costs and charges by it about its defense in this behalf expended, and that execution issue therefor.

11 Now, afterwards, to wit, on the 4th day of September, in the year last aforesaid, came again the plaintiff, by her attorneys, and filed in the clerk's office of said court her bill of exceptions and petition for writ of error and assignment of errors; which said bill of exceptions, petition for writ of error, and assignment of errors are as follows, to wit:

UNITED STATES OF AMERICA,
Southern District of Illinois.

In Circuit Court, June Term, A. D. 1891.

AUGUSTUS T. POST
vs.
THE COUNTY OF PULASKI. } Bill of Exceptions.

Be it remembered that on the trial of this cause, at the June term, A. D. 1891, of the said circuit court, the plaintiff, to maintain the issue on *his* part, gave in evidence to the court the following:

POST
vs.
PULASKI COUNTY.

Direct examination of Mr. DANIEL HOGAN by T. C. MATHER:

Q. Mr. Hogan, you lived in Pulaski county?
A. Yes, sir.
Q. Since what year—how long?
A. For the last thirty-five or forty years.
Q. Did you hold any office in that county in October, 1872?
A. No, sir.
Q. You did after that, didn't you?
A. Yes, sir.
Q. How soon?
A. I was elected county clerk in 1873.
Q. Did you know George S. Pidgeon, who was county judge of Pulaski in October, 1872, and E. B. Watkins, county clerk of Pulaski in 1872?
A. Yes, sir.
Q. You know their handwriting?
A. Yes, sir.
Q. Look at that bond and state whether these are the genuine signatures.
A. Yes, sir.
Q. One was county judge and the other county clerk?
A. Yes, sir.
12 Q. You knew they were at that time?
A. Yes, sir.

Q. Just take these coupons and see if the signatures on those coupons are the signatures of E. B. Watkins.
A. Yes, sir; they are.
Q. All the same series of bonds, are they?
A. I don't know anything about that.
Q. There were only ninety-five thousand issued altogether?
A. Yes, sir.

Mr. Mather offers in evidence the bond and coupons.
(Objection interposed by defense. Objection overruled. Exception.)
The following bond offered in evidence as being the same as all the issue excepting the numbers:

Number UNITED STATES OF AMERICA. Dollars 500.

Pulaski County Bond.

County of Pulaski, *State of Illinois.*

Know all men by these presents, that the county of Pulaski in the State of Illinois, acknowledges itself indebted to the Cairo & Vincennes Railroad Company or bearer in the sum of $500 which sum the said county promises to pay said company or bearer, in the city of New York twenty years after date, with interest thereon from and after November 1, 1872, at the rate of eight per centum per annum, payable half yearly on the first days of January and July of each years, except the last coupon which is payable with this bond on the presentation and surrender at the place in said city of New York where the treasurer of the State of Illinois pays the interest and debt of said State, of the coupons hereto attached. This bond *in* one of 200 of like tenor and amount, of the same issue and is issued pursuant to an order of the county court of said county authorized by a majority of the legal votes cast at an election held in said county pursuant to law, on the 5th day of November A. D., 1867.

This bond is also issued under the provisions of an "Act to incorporate the Cairo & Vincennes Railroad Company" approved March 6, 1867, and under the provisions of an act to amend said act, approved February 9, 1869, also under the provisions of an act entitled an "Act to fund and provide for the payment of the railroad debts of counties, townships, cities and towns" approved April 16, 1869, and is in part payment of a subscription to the capital stock of the Cairo and Vincennes Railroad Company in the total sum of one hundred thousand dollars.

In testimony whereof, the said county of Pulaski has executed this bond by the county judge of said county under the order
13 of the county court of said county, signing his name hereto, and by the clerk of said court under the order thereof, attesting the same and affixing hereto the seal of said court. This done

at the office of the clerk of said court, this seventeenth day of October, A. D. 1872.

GEORGE S. PIDGEON,
County Judge of Pulaski County, State of Illinois.

Attest: E. B. WATKINS,
Clerk of County Court of Pulaski County, Illinois.

The plaintiff then offered in evidence the following orders of the county court of Pulaski county, to wit:

Copy of Order on Page 245, *Order Book "C," Pulaski County.*

MONDAY, *Sept.* 16, 1867.

Court met pursuant to adjournment.

Present: A. M. Brown, county judge; George A. Carter, associate J. P.; S. O. Lewis, sheriff; H. C. Hertz, county clerk.

Ordered that the court do now adjourn until Tuesday morning at 10 o'clock.

A. M. Brown. Geo. W. Carter. W. L. Hambleton.

Copy of Order on Page 246, *Order Book "C."*

COUNTY CLERK'S OFFICE,
TUESDAY, *September* 17, 1867.

Court met pursuant to adjournment.

Present as before.

Be it hereby ordered that the order made on the 4th day of September, 1867, for an election to be held on the 7th day of October, 1867, upon the question of issuing bonds for the Cairo, Mound City and Vincennes railroad, be, and the same is hereby, rescinded; whereupon it is ordered by the court that the following order be made. "It is hereby ordered by the court that an election be held in Pulaski county, at the various voting precincts of said county, on the 5th day of November, 1867, upon the following questions, to wit:

1st. That Pulaski county subscribe the sum of one hundred thousand dollars to the capital stock of the Cairo and Vincennes Railroad Company.

2d. That in payment of said subscription of one hundred thousand dollars to the capital stock of said Cairo & Vincennes Railroad Company bonds of Pulaski county be issued to said railroad company in the denomination of five hundred dollars each; said bonds to bear interest at the rate of eight per cent. per annum, payable half yearly on the 1st days of January and July of each year, in the city of New York; said bonds to run twenty years, and the faith of the county of Pulaski to be pledged for the payment of the principal and interest thereof; said bonds redeemable at any time at the pleasure of the county.

3d. That a tax of not more than one dollar on each hundred dollars' worth of taxable property of Pulaski county shall be levied to pay the interest and principal of said bonds when issued; said

bonds to be issued to said company whenever ten miles of the
14 track of said road has been laid from Cairo northward and cars have run on said track.

It is further ordered by the court that all of said questions be voted upon as one question, and all voters of Pulaski county who favor the adoption of said proposition shall have written upon their tickets "For subscription to Cairo & Vincennes Railroad Company," and all voters of Pulaski county who oppose the adoption of said proposition shall have written or printed upon their tickets "Against subscription to Cairo & Vincennes Railroad Company."

The Proceedings of the December Term County Court, December 2nd, 1867, Page 256, Order Book "C."

Whereas the people of Pulaski county are deeply interested in a pecuniary point of view in the speedy construction of the Cairo and Vincennes railroad;

And whereas the duty — to use all legal means in their power to secure the construction of said road at a n early day;

And whereas the Cairo & Vincennes Railroad Company has this day laid before this court a contract and propose that this court should join said company in the execution thereof for the purpose of securing the building of said railroad, said contract being in the words and figures following, to wit:

This contract, made and entered into by and between Alexander M. Brown, county judge, and William L. Hambleton and George W. Carter, associate justices of the county court of Pulaski county, Illinois, who act for and on behalf of Pulaski county, parties of the first part, and the Cairo & Vincennes Railroad Company, party of the second part, witnesseth:

That whereas, heretofore, to wit, on the 5th day of November, 1867, by a vote of the electors of Pulaski county, Illinois, at an election held in said county, the county court of said county was authorized to make a subscription of one hundred thousand dollars to the capital stock of said Cairo & Vincennes Railroad Company, and to pay for said stock in bonds of said county in the denomination of five hundred dollars each, the bonds to run for twenty years and to bear interest at the rate of eight per cent. per annum, payable half-yearly, on the first days of January and July of each year, in the city of New York, said bonds to be issued by said county when the track of said road shall have been laid ten miles from Cairo northward and cars shall have run thereon; and whereas said railroad company proposes to guarantee that work on said road shall be commenced at Cairo within six months from the date of this contract, and that the construction of the road-bed and laying of the track from Cairo northward shall be pushed with reasonable dispatch, and also to release the county of Pulaski from the obligation to issue any part of the said bonds until the said rail-
15 road is built from Cairo to a point ten miles within the limits of Pulaski county, and also to purchase of Pulaski county the

stock of said company to be issued to said county upon the delivery of the county bonds aforesaid: It is therefore hereby stipulated and agreed by and between the parties aforesaid as follows:

Article 1. The party of the second part agrees that work on said road shall be commenced at Cairo within (6) months from the date of this contract, and that the construction of the road-bed and laying track from Cairo northward shall be pushed with reasonable dispatch.

Article 2. The party of the second part agrees that instead of the county of Pulaski issuing bonds for payment for stock when the track of said road shall have been laid ten miles from Cairo northward and cars shall have run thereon, the county of Pulaski shall issue fifty thousand dollars of bonds and deliver the same to said company in payment for stock when the track of said road shall have been laid to a point ten miles within said Pulaski county and cars shall have run thereon, and that said county shall issue fifty thousand dollars of bonds as aforesaid, and deliver the same to said company in payment for stock when the track of said road shall have been laid and cars shall have run thereon from the city of Cairo through Pulaski county.

Article 3. The party of the first part hereby agree to issue fifty thousand dollars of bonds of Pulaski county in payment for fifty thousand dollars of stock of the Cairo & Vincennes Railroad Company, and deliver said bonds to said company whenever the railroad track of said company is laid from the city of Cairo to a point ten miles within the boundary line of Pulaski county and cars shall have run thereon, and also to issue fifty thousand dollars of said bonds in payment for stock as aforesaid, and deliver the same to said company whenever the track of said company is laid from the city of Cairo through said county and cars have run thereon.

Article 4. And whereas the early construction of said railroad is of vast importance to the people of Pulaski county; therefore, in consideration of the stipulation made by the party of the second part in articles first and second of this contract and in consideration of the sum of five thousand dollars to be paid by the said party of the second part, as hereinafter stated, the parties of the first part hereby agree to sell and transfer to the said party of the second part the one hundred thousand dollars stock of said railroad company to be issued to Pulaski county in payment for one hundred thousand dollar-county bonds at and for the sum of five thousand dollars, as follows:

When fifty thousand dollars of the stock of said company is issued to Pulaski county the party of the first part agrees to transfer and assign the same to the party of the second part on payment of twenty-five hundred dollars in Pulaski county bonds, and when the other fifty thousand dollars of the stock of said company is issued as aforesaid the party of the first part agrees to transfer and assign the same to the party of the second part on payment of twenty-five hundred dollars in Pulaski county bonds. This contract is executed in duplicate and made and signed by the

parties of the first part in open court, in the town of Caledonia, Pulaski county, Illinois, and made a matter of record in said court.

The whole done and executed this second day of December, A. D. 1867.

Witness our hands and seals.

A. M. BROWN, [SEAL.]
County Judge of Pulaski Co., Illinois.
W. L. HAMBLETON, [SEAL.]
Ass. Justice Pulaski Co., Ill.
GEORGE W. CARTER, [SEAL.]
Ass. Justice Pulaski Co., Ill.
THE CAIRO AND VINCENNES RAILROAD COMPANY, [SEAL.]
By GREEN B. RAUM,
Pres. Cairo & Vincennes Railroad Co.

Attest, with the seal of said court affixed:

H. C. MERTZ,
County Clerk.

And the court, having fully considered said contract and being of the opinion that the interest of the people of Pulaski county will be conserved by the execution thereof, have this day executed the same in due form of law and caused the same to be attested by the clerk of this court, with the seal of office attached, and said contract is hereby made a matter of record in this court accordingly. I approve the foregoing order.

(Signed) A. M. BROWN, *Co. Judge.*
W. L. HAMBLETON, *Ass. Justice.*
G. W. CARTER, " "

Copy of order on page 391 of Order Book "C," county clerk's office, Pulaski county, July term, 1870; continued 12th day of July, 1870.

Ordered that if Ambrose E. Burnside or others shall commence work of C. & V. R. R. on or before July 1, 1871, and prosecute same with reasonable diligence and to completion on or before December 1, 1872, that said — shall be entitled to the county subscription to said road on the terms and conditions heretofore stipulated, provided and upon the condition that all *bona fide* claims due citizens of this Pulaski county for the construction of said railroad or accruing to them in the building thereof and now due and any
17 and all indebtedness of said railroad company for work and labor, materials furnished, etc., be paid by said company.

GEORGE S. PIDGEON, *Co. Judge.*
OBED EDSON, *Associate Judge.*
C. HOFFNER, *Asso.* "

Page 255, Order Book "C," Co. court, June term, A. D. 1871.

Cairo & Vincennes Railroad Company.

Whereas heretofore, to wit, on the 5th day of November, 1867, the proposition to subscribe $100,000 to the capital stock of the Cairo and Vincennes Railroad Company was duly submitted and approved by a majority of the qualified voters of Pulaski county and this court duly authorized to subscribe for said stock;

And whereas heretofore, to wit, on the 2d day of December, A. D. 1887, the county court of said county, for and on behalf of said county, made and entered into an executory contract for the sale of said stock for a valuable consideration and the performance of certain conditions on the part of said company;

And whereas the time for the performing of several matters therein stipulated to be done by said company has expired;

And whereas the said company are still willing to execute and fulfill said contract on their part;

And whereas the said company, in consideration of further time being given for the construction of said railroad, propose and agree that said bonds shall not be delivered or interest begin to run until a train of cars shall pass over said road from Cairo to Vincennes;

And whereas it is highly desirable and to the interest of the people of said county that said Cairo & Vincennes railroad be built as speedily as possible:

Therefore and upon the condition that work be in good faith resumed on said railroad within six months from this date—

Be and it is hereby ordered and agreed that this county will, after resumption of work as aforesaid on said road, execute and deliver to and place in the hands of a responsible trustee the bonds of said county of the denomination, kind, and number described in said contract for the sale of stock of said company, to be held and disposed of as follows:

The said bonds shall be delivered by said trustee to the president or other duly authorized agent of said Cairo & Vincennes Railroad Company after a train of cars shall pass over said road from Cairo to Vincennes:

Provided, however, that the delivery of said bonds to said company shall be made and only upon the express condition that a train of cars shall pass over the line of said railroad from Cairo to
18 Vincennes within two years from and after the delivery of said bonds to said trustee; and if a train shall not pass over said road within the time above limited, then and in that case the said trustee shall deliver the said bonds to the county judge of said county or to any duly authorized agent of said county.

And it is further stipulated that in the event of the completion of said road within the time limited that the delivery of said bonds to said company shall be under the contract for the sale of stock and in compliance with the terms thereof, and shall be deemed and taken as a full compliance on the part of Pulaski county with the terms of said contract for the sale of stock to said C. & V. R. R. Company.

Present at above meeting: G. S. Pidgeon, Obed Edson, ass. justice; Kennedy, sheriff; Watkins, clerk.

Adjourned to the 13th.

Pages 488 and 489, Order Book "C," March term, 1872.

MARCH 4TH.

Present: Geo. S. Pidgeon, county judge; Caleb Hoffner, ass. judge; Obed Edson, ass. judge; Kenneddy, sheriff; Watkins, clerk.

Whereas the people of Pulaski county, in the State of Illinois, have by a legal majority authorized the county court of said county of Pulaski to subscribe one hundred thousand dollars ($100,000) to the capital stock of the Cairo & Vincennes Railroad Company:

Now, therefore, we, the county court of Pulaski county, State of Illinois, for and on behalf of the people of said county, do hereby subscribe for one thousand shares of the capital stock of the Cairo & Vincennes Railroad Company and agree to pay for the same one hundred thousand dollars in the bonds of said county, bearing interest at the rate of eight per cent. per annum, payable semi-annually, the principle of said bonds to be due in twenty years, and with the coupons attached to be payable in the city of New York.

This subscription in no way interferes with nor invalidates the contract between said county and said railroad company, which contract is now in force and by virtue of which the capital stock of said company to be received by said county is sold or to be sold and delivered to said railroad company in the manner therein stated, and this court hereby recognizes the fact that said railroad company has commenced and has prosecuted the work upon said railroad in accordance with the orders by this court made from time to time. In witness whereof the said county court, by the hands of George S. Pidgeon, county judge, and Obed Edson and Caleb Hoffner, associates, for and in behalf of said county of Pulaski, has
19 on this the 4th day of March, A. D. 1872, made this subscription under the orders of said court at Mound City, Illinois, in open court.

GEO. S. PIDGEON,
County Judge.
OBDED EDSON,
Associate Judge.
CALEB HOFFNER,
Associate Judge.

Page 489.

Whereas at the June term, A. D. 1871, of this court it was then ordered that the time for building and completing the Cairo and Vincennes railroad under the contract then existing between the county of Pulaski and said road should be extended, and the subscription of the said county to the capital stock of said railroad company and the sale of said stock to said company should be held and continued valid and binding, and the time for the building of said road extended, provided and upon the condition that work should

be resumed in good faith on said road within six months next after said term, and should be completed within two years after the resumption of work as aforesaid, and upon the further condition that the bonds of said county should not be delivered to said company nor interest begin to run until after a train should pass over said road from Cairo to Vincennes;

It was further ordered that this county would, upon the resumption of work as aforesaid, issue its bonds in the sum of $100,000, to be placed in the hands of a trustee, to be delivered to said company upon the condition aforesaid; and whereas said company has resumed work on the line of said road in good faith within the time agreed:

Now, therefore, it is hereby ordered that the bonds of said county as aforesaid be duly prepared, and that the county judge and the county clerk be, and they are hereby, authorized and directed to execute the bonds of said county in the sum of $95,000 in sums of five hundred dollars each in the usual form, and to deliver the same to A. B. Safford, cashier of the City National Bank of Cairo, in trust, and to be delivered upon the condition hereinbefore mentioned; and it is further agreed that upon completion of said road and the delivery of said bonds upon the terms and conditions hereinbefore expressed this county will accept and receive the balance of said sum of one hundred thousand dollars, to wit, $5,000, due to said company in full payment for the sum of one hundred thousand dollars stock in said road, and will waive the actual issue thereof to said county; and it is further ordered that a copy of this order shall be delivered, together with said bonds, to said trustee.

Present: Same as above.

Page 223, Order Book "C."

September Term, A. D. 1872, Monday, 2d Day.

Present: Obed Edson, ass. justice; Caleb Hoffner, ass. justice.

20 In the Matter of the Pulaski county bonds to be issued to the Cairo & Vincennes Railroad Company.

The county judge and county clerk of Pulaski county are hereby expressly ordered not to issue or sign or execute any bonds upon the county of Pulaski to the Cairo & Vincennes Railroad Company which does not strictly conform to the order of this court heretofore made at the March term, A. D. 1872, of this court, and the said county judge and county clerk are further ordered to execute no bond or bonds upon the county of Pulaski to said railroad company until such bond shall have been first submitted to this court and board for inspection and approval.

Page 526, Order Book "C."

October Term, 1872, 15th day.

Present: Geo. S. Pigeon, county judge; Obed Edson, associate judge; Caleb Hoffner, associate judge.

Special Pulaski County Court.

Cairo & Vincennes Railroad Company.

Order for the Delivery of the County Bonds to A. B. Safford, Trustee, etc.

Whereas the bonds of Pulaski county in aid of the Cairo & Vincennes Railroad Company have been duly submitted and inspected by this court and found satisfactory, it is, therefore, ordered that the bonds in the sum of ninety-five thousand dollars be duly executed by the county judge and county clerk and a registry thereof made, and that said bonds, together with a certified copy of the order and conditions upon which the same are to be delivered to the Cairo & Vincennes Railroad Company, *to* be placed in the hands of A. B. Safford, Esq., cashier of the City National Bank of Cairo, in trust for the benefit of said Pulaski county and said Cairo & Vincen- Railroad Company.

Direct examination of E. W. McClellan by T. C. Mather:

Q. Give your name.
A. E. W. McClellan.
Q. You are the present county clerk of Pulaski county?
A. Yes, sir.
Q. How long have you been?
A. Four years last December.
Q. You are in charge of the records belonging to Pulaski county?
A. Yes, sir.
Q. Do you know of anything on the records of Pulaski county court showing the result of the canvas- of the vote had in the county in November, 1867, regarding the subscription to the Cairo and Vincennes Railroad Company?
21 A. There is a minute of something about the election.
Q. Can you turn to it?
A. It mentions something about the election. There is no order for the election that I ever saw.
Q. Have you ever seen any meeting of the board when the result of that election was canvassed and declared?
A. No, sir.
Q. Have you ever examined the records as to what orders were issued?
A. Yes, sir.
Q. Do you know of anything in the records of your office or among the papers showing anything further about the election than that you have abstracted in the record?
A. No, sir.

Q. Has your county taken any vote on funding this issue of subscription to the Cairo and Vincennes railroad?

(Objection interposed by defense. Objection overruled. Exception.)

A. I understand there was.
Q. Can you turn to the records?
A. No, sir; I'm not sure.
Q. Your record contains something with regard to that?
A. Yes, sir.
Q. What record is it?
A. County Court Order Book "D," Pulaski county, 479.
Q. What appears on it?

(Objection interposed by defense. Objection overruled. Exception.)

A. Convening order, March 15, 1880.
Q. That election was held, was it?
A. I suppose so.
Q. Don't the record show it?
A. I don't think I ever examined it on that point.
Q. This book contains all the record with regard to that funding proceeding?
A. All there is of record; yes, sir.
Q. Do you know whether new bonds were issued by the county of Pulaski to fund these old bonds with?
A. I suppose so.
Q. Do you know whether any were exchanged for the old bonds?
A. Yes, sir.
Q. How many?
A. $59,100.

22 Cross-examination by Mr. WHEELER:

Q. This funding scheme did not contemplate to charge dollar for dollar, did it, Mr. McClellan?
A. I understand not; no, sir.
Q. The rate was sixty-two and one-half per cent.?
A. I find it so.

Mr. HOGAN recalled.

Questions by Mr. MATHER:

Q. This Cairo and Vincennes railroad has been constructed and runs from Cairo to Vincennes?
A. Yes, sir.
Q. How many years has it been running?
A. I think the first train run over it on the 25th day of December, 1872, and it has been running ever since.
Q. You said on the 25th day of December?
A. Yes, sir.
Q. Now, sir, can you tell the court when the road was so far com-

pleted northward from Cairo as to have a train run over it ten miles northward from Cairo?

A. No, sir.

Q. This was done a good while before the road was completed from Cairo to Vincennes?

A. A short time before. They ran the track up very speedily.

Q. What is the distance between Cairo and Vincennes?

A. 157 miles.

Q. How long before this time that the train ra- from Cairo to Vincennes would you say the road was built ten miles north from Cairo and the train had run over it?

A. A very short time. They had run three gangs of men laying tracks day and night before this train ran through, and the first train was torn up so that it was some time before they ran again.

Q. Where did they begin?

A. At both ends, and ran towards the middle.

Q. Carmi is north of Cairo, is it?

A. Yes, sir; about sixty miles.

Q. Did they build from Cairo northward to Carmi and operate it before they operated from Cairo to Vincennes?

A. I don't know personally what took place at Tunnel Hill. I was agent from Tunnel Hill south.

Q. What kind of an agent?

A. Local agent, telegrapher, etc.

Q. When did you commence doing that?

A. I began to work before it was completed.

Q. What date?

A. I don't remember.

Q. What time did you first collect any freight.

23 A. I can't tell you that; about the 25th of December.

Q. Don't you mean that was the first through train from Cairo to Vincennes?

A. We did run this train through.

Q. Before that time had they been running trains northward from Cairo?

A. I think they did run some trains over the road.

Q. How much earlier?

A. Not to exceed ten or twelve days.

Q. Did they begin constructing the road northward from Cairo as soon as any other part?

A. I guess so. They were running trains on the north before the south end.

Q. South of Tunnel Hill would be toward Cairo?

A. Yes, sir.

Q. Didn't they run in Pulaski over the road about as soon as anywhere else?

A. I think not.

Q. In Johnson county?

A. No, sir.

Q. In what county?

A. In White and Saline.

Q. Before they did from Cairo northward?
A. Yes, sir.
Q. Did they have the track constructed from Cairo northward before they ran this train?
A. Yes, sir.
Q. How long?
A. Not more than ten or twelve days; probably a month.
Q. Do you remember the date of the train that ran from Cairo northward?
A. I think it was December.
Q. When did those construction trains run northward?
A. About ten or twelve days before. They fixed the tunnel temporarily.
Q. Then what you mean to say is that some ten or twelve days or maybe a month before the 25th of December they did have trains running northward?
A. Yes, sir.

Cross-examination by Mr. WHEELER:

Q. Is it not true that the road between Cairo and Mound City was the last to be constructed?
A. Yes, sir. The whole gang came down there to build it.
Q. Well, now, to refresh your recollection, is it not true that
24 the iron and steel that was used in laying the track was unloaded from Mound City from steamboats?
A. Yes, sir. I had forgotten about it.
Q. So that the track-laying was carried on from Mound City northward and also south.
A. Yes, sir.
Q. Do you remember the circumstances of the locomotive being brought in?
A. Yes, sir.
Q. The first locomotive didn't come through the tunnel or through Cairo?
A. No, sir. My recollection is that there was a whole gang came in Pulaski county to finish it up.
Q. Well, then, the road from Cairo northward was not open more than ten days before the 25th day of December, 1872?
A. I don't think it was.

And the defendant, to maintain the said issue on its part, gave in evidence to the court the following:

Examination-in-chief of Mr. HOGAN by defense:

Q. Was you county clerk of Pulaski in 1881 and 1882?
A. Yes, sir.
Q. Did you live in the county in 1867?
A. Yes, sir.
Q. Do you remember anything with regard to this election that was held on November 5th and the vote was taken upon this prop-

osition to subscribe for the capital stock of the Cairo and Vincennes Railroad Company?

A. Yes, sir.

Q. Do you remember of seeing any notice given of that election?

(Objection interposed by Mr. Mather. Objection overruled. Exception.)

A. No, sir; I was not connected officially in any way.

Q. Have you examined the records in the office since?

A. Yes, sir; I have. It might have been burned up.

Q. Did you ever search for a copy of any notice that was given of that election?

A. No, sir.

Q. You never found anything connected with it?

A. No, sir.

Q. When were the records burned that you speak of?

A. In 1879; the court-house burned up in 1879.

Q. You had been in office some five or six years?

A. Yes, sir.

Q. Was there at that time any understanding or tradition as to whether any notice had been given?

25 A. I don't know anything about it. I understand some thought there was no necessity for a notice.

(Foregoing evidence objected to by Mr. Mather. Objection overruled. Exception.)

Direct examination of CALEB HOFFNER by Mr. WHEELER:

Q. You was an associate justice of the county court of Pulaski county in 1867?

A. No, sir.

Q. You was in '73?

A. I was elected as one of the associate justices in *in* 1869—November term of 1869. George Brown, Wm. L. Hambleton, and Geo. Pidgeon served up to December, 1869.

Q. Where are these three men?

A. They are all dead.

Q. Do you remember the circumstances of the submission of the subscription of the Cairo and Vincennes railroad?

A. I don't, only from the record.

Q. You lived in Pulaski county at the time of the date of this election, November, 1867?

A. Yes, sir.

Q. You lived there for many years before and ever since?

A. Yes, sir.

Q. Do you remember anything about any notice of this election being given in the part of the county where you resided or in any other part?

(Objection interposed by Mr. Maher. Objection overruled. Exception.)

A. I don't think it was necessary. If I'm allowed to do so, I can tell you something about it. We looked over the record and the question was broached by me. There was two members of the board at that time—that is, the clerk and one member of the county court—seemed to be anxious to have the bonds issued, and if there was any notice given of the election of the submission to the people I don't know.

Q. Did you make any search?

A. We looked over the record and we could not find any minute of any notice.

Q. Well, what was developed about it at that time, if anything? What did you find out with regard to this subject of the notice?

A. We found nothing.

Q. I want to ask you now whether there was ever any stock of the Cairo and Vincennes railroad delivered to the county or to the county authorities at the time the bonds were issued—whether any shares of stock were ever issued to the county?

A. Well, I can only state from the record.

26 Q. Was you present when this record was made?

A. I was not.

Q. Did there ever any stock issue to the county?

A. Not that I know of.

Q. Your understanding is that it was waived by an order?

A. Yes, sir.

Q. Was there any claim made at that time, when this question was under discussion, as to the necessity of giving notice of this election.

(Objection interposed by Mr. Mather. Objection overruled. Exception.)

A. I really don't know. There was something said about it, but what the substance was I am not able to state. The question before the court was whether there was any notice given, and nobody didn't seem to know that there was, and some said it was not necessary.

Q. Do you remember that it was at any time when any representatives of the railroad company were present asking for this order?

A. I don't remember whether there was any railroad representatives. I remember that S. P. Wheeler was. That was in 1872.

Q. Was that at the time that these orders were made?

A. I don't think it was.

Q. Was that matter discussed at that time?

A. I don't remember. There was a great deal said about the railroad passing through the county, and the western portion of the county was against taxing the county, and the eastern portion of the county was in favor of it.

(Foregoing evidence objected to by Mr. Mather. Objection overruled. Exception.)

Cross-examination by Mr. MATHER:

Q. This was so long ago that you have no distinct recollection as to whether there was notice or not?
A. No, sir; I distinctly recollect that I voted against the stock.
Q. Was there a pretty general turnout at that election?
A. I think there was.
Q. Do you recollect about how many votes were cast?
A. I don't know.
Q. Do you recollect about how much majority there was?
A. I think considerable.
Q. In favor of the subscription?
A. Yes, sir.

Which was all the evidence offered by either of said parties.

Whereupon the court, having heard and considered all the evidence offered by either party, made the following special finding of facts, to wit:

27 First. Plaintiff in this case is the *bona fide* holder of one hundred and ninety-six interest coupons cut from thirty-six bonds of Pulaski county, Illinois; which bonds and coupons were offered and received in evidence in this case.

Second. That all the bonds and coupons offered and received in evidence are of the same tenor and effect, with the exception of the numbers thereof and the respective dates of maturity.

Third. That said bonds, with the coupons attached, bear date on the 17th day of October, 1872, as part of the larger issue to the Cairo & Vincennes Railroad Company in part payment of stock.

Fourth. That the records of Pulaski county offered and received in evidence with reference to the issue of said bonds and coupons by the said county are unimpeached, and the matters stated therein are specially found to be true and present all that appears of record in said county in relation thereto.

Fifth. That the order of the county court of Pulaski county calling an election for the purpose of voting for or against subscription to the capital stock of said Cairo & Vincennes R. R. Co. makes no provision for giving any notice of said election, and the plaintiff neither offered nor introduced any evidence *de hors* said records and bonds tending to prove that any notice of said election or holding thereof was even given.

Sixth. That no subscription by the county of Pulaski to the capital stock to the Cairo & Vincennes R. R. Co. was made or attempted to be made until the fourth day of March, 1872, at which time the court finds that the county court of Pulaski county entered an order upon its order book subscribing for $100,000 of the capital stock of the Cairo & Vincennes R. R. Co.

Seventh. The court further finds that each of the bonds in evidence recites upon its face "that the same is issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county pursuant to law on the 5th day of November, A. D. 1867," and "is also

issued under the provisions" of "An act to incorporate the Cairo & Vincennes Railroad Company," approved March 6th, 1867, and under the provisions of an act to amend said act, approved February 9th, 1869; also under the provisions of an act entitled "An act to fund and provide for the payment of the railroad debts of counties, townships, cities, and towns," approved April 16th, 1869, and that each of said first-mentioned acts were offered and received in evidence and read, as found on pp. 553 to 562, 2 vol., Priv. Laws Ill., 1867, and pp. 256 to 261, vol. 3, Priv. Laws Ill., 1869, respectively.

Eighth. The court further finds from the evidence the fact to be that the Cairo & Vincennes R. R. was constructed ten miles northward from Cairo, and cars were running thereon by the 15th day of December, A. D. 1872.

28 Whereupon, upon such special findings of facts, plaintiff requested the court to hold as a proposition of law "that in view of the recitals in plaintiff's bonds in evidence and of the provisions of the law recited therein and of the recitals in the county records in evidence and of the completion of the road as found, and in view of plaintiff being a *bona fide* holder of said bonds and coupons as found, that plaintiff is entitled to judgment for the amount of his coupons in evidence."

Which proposition of law the court denied and refused to hold; to which denial by the court and refusal to so hold the plaintiff then and there took exceptions and still excepts.

Whereupon the court rendered judgment for the defendant upon said special findings and filed a written opinion; to which judgment in favor of defendant plaintiff then and there excepted and still excepts.

And inasmuch as the matters aforesaid do not appear of record the counsel for the plaintiff presents this bill of exceptions and prays that the same may be signed and sealed by the court and made part of the record in said cause, and it is done accordingly.

WILLIAM J. ALLEN [SEAL.]

UNITED STATES OF AMERICA,
Southern District of Illinois.

In Circuit Court, June Term, A. D. 1891.

AUGUSTUS T. POST
vs.
THE COUNTY OF PULASKI.

Petition for Writ of Error.

And now comes the plaintiff in the above-entitled suit, by his attorneys, and petitions the court for a writ of error in this cause to the circuit court of appeals for the seventh circuit, to be holden in the city of Chicago in the month of October, 1891.

And the plaintiff herewith files an assignment of errors as required by the rules of said circuit court of appeals.

CONNOLLY & MATHER,
Attorneys for Post.

Assignment of Errors.

1st. The circuit court erred in admitting in evidence, against the objections of plaintiff and in view of the recitals in plaintiff's bonds, the following evidence offered by defendant, and tending to prove there was no notice given of the election of November 5, 1867, in Pulaski county, Illinois, to determine whether the county would subscribe to the stock of the Cairo and Vincennes railroad and issue the bonds in question in payment thereof.

29 *Evidence.*

Examination-in-chief of Mr. HOGAN by defense:

Q. Was you county clerk, Mr. Hogan, of Pulaski, in 1881 and 1882?

A. Yes, sir.

Q. Did you live in the county in 1867?

A. Yes, sir.

Q. Do you remember anything with regard to this election that was held on November 5th and the vote taken upon this proposition to subscribe for the capital stock of the Cairo and Vincennes Railroad Company?

A. Yes, sir.

Q. Do you remember of seeing any notice given of that election?

A. No, sir; I was not connected officially in any way.

Q. Have you examined the records in the office since?

A. Yes, sir, I have; it might have been burned up.

Q. Did you ever search for a copy of any notice that was given of that election?

A. No, sir.

Q. You never found anything connected with it?

A. No, sir.

Q. When were the records burned that you speak of?

A. In 1879; the court-house burned up in 1879.

Q. You had been in office some five or six years?

A. Yes, sir.

Q. Was there at that time any understanding or tradition as to whether any notice had been given?

A. I don't know anything about it. I understand some thought there was no necessity for a notice.

Examination-in-chief of CALEB HOFFNER by Mr. WHEELER:

Q. You was an associate justice of the county court of Pulaski county in 1867?

A. No, sir.

Q. You was in '73?

A. I was elected as one of the associate justices in 1869—November term, 1869. George Brown, William L. Hambleton, and George Pidgeon served up to December, 1869.

Q. Where are these three men now?

A. They are all dead.

Q. Do you remember the circumstance of the submission of the subscription of the Cairo and Vincennes railroad?

30 A. I don't, only from the record.

Q. You lived in Pulaski county at the time of the date of this election—November, 1867?

A. Yes, sir.

Q. You lived there for many years before and ever since?

A. Yes, sir.

Q. Do you remember anything about any notice of this election being given in the part of the county where you resided or in any other part?

A. I don't think it was necessary. If I'm allowed to do so I can tell you something about it. We looked over the record and the question was broached by me. There was two members of the board at that time—that is, the clerk and one member of the county court—seemed to be anxious to have the bonds issued, and if there was any notice given of the election of the submission to the people I don't know.

Q. Did you make any search?

A. We looked over the record and we could not find any minute of any notice.

Q. Well, what was developed about it at that time, if anything; what did you find out with regard to this subject of the notice?

A. We found nothing.

Q. Was there any claim made at that time, when this question was under discussion, as to the necessity of giving notice of this election?

(Objection interposed by Mr. Mather. Objection overruled. Exception.)

A. I really don't know. There was something said about it, but what the substance was I'm not able to state. The question before the court was whether there was a notice given, and nobody didn't seem to know that there was, and some said it was not necessary.

Cross-examination by Mr. MATHER:

Q. This election was so long ago that you have no distinct recollection as to whether there was a notice or not?

A. No, sir; I distinctly recollect that I voted against the stock.

Q. Was there a pretty general turnout at the election?

A. I think there was.

Q. Do you recollect about how many votes were cast?

A. I don't know.

Q. Do you recollect about how much majority there was?

A. I think considerable.

Q. In favor of the subscription?

A. Yes, sir.

31 2d. The court erred in receiving and considering this evidence in its determination of this cause in favor of the defendant.

3d. The court erred, when it determined this cause, in holding, against the exceptions of the plaintiff, that notwithstanding the recitals in plaintiff's bonds and the provisions of the laws referred to therein, that the defendant was not estopped from making the defense to said coupons and bonds, that there was no sufficient election notice given of said election of November 5, 1867.

4th. The court erred in determining the issues for the defendant in view of the evidence in this case and in rendering judgment for the defendant.

5th. The court erred in not finding the issues for afid in not rendering judgment in favor of the plaintiff herein.

6th. The court erred in refusing to apply to the facts of this case as found by the court and set out in the special findings the following proposition of law asked for by the plaintiff and refused to be held or applied by the court, viz:

"That in view of the recitals in plaintiff's bonds in evidence and of the provisions of the laws recited therein and of the recitals in the county records in evidence and of the completion of the road as found, and in view of plaintiff being a *bona fide* holder of said bonds and coupons as found, that plaintiff is entitled to judgment for the amount of his coupons in evidence."

CONNOLLY & MATHER,
Attorneys for Post.

Afterwards, to wit, on the 4th day of September, in the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

MARY E. POST, Administratrix of the Estate of Augustus T. Post, Deceased, *vs.* THE COUNTY OF PULASKI.	Assumpsit.

On motion of the plaintiff, by her attorneys, Connolly & Mather, the writ of error to the United States circuit court of appeals for the seventh circuit was allowed plaintiff on her entering into bond to the defendant in the penalty of one thousand dollars within sixty days from this date, and with security to be approved by the clerk of this court.

Afterwards, to wit, on the 9th day of September, in the year last aforesaid, came again the plaintiff, by her attorneys, and filed in the clerk's office of said court her bond on writ of error herein; which said bond is as follows, to wit:

32 In Circuit Court, June Term, 1891.

UNITED STATES OF AMERICA,
Southern District of Illinois.

MARY E. POST, Administratrix of the Estate of Augustus T. Post, Deceased,
vs.
THE COUNTY OF PULASKI.
} Bond.

Know all men by these presents that Mary E. Post, administratrix of the estate of Augustus T. Post, deceased, the plaintiff in this suit, as principal, and R. D. Lawrence, of Springfield, Illinois, as surety, are held and firmly bound unto The County of Pulaski, Illinois, the defendant in the above-entitled cause, in the penal sum of one thousand dollars, good and lawful money of the United States of America, well and truly to be paid by each of us, our heirs, executors, and assigns.

Sealed with our seals and dated this ninth day of September, A. A. 1891.

Whereas the above-bounden Mary E. Post, administratrix, etc., hath prosecuted a writ of error to the United States circuit court of appeals for the seventh circuit to reverse the judgment rendered in the above-entitled *judgment* by the United States circuit court for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Mary E. Post shall prosecute her said writ of error to effect and answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Witness the hands and seals of said principal and surity this 9th day of September, A. D. 1891.

MARY E. POST,
[SEAL.] *Administratrix of the Estate of Augustus T. Post, Deceased,*
By CONNOLLY & MATHER,
Her Attorneys.
[SEAL.] R. D. LAWRENCE, *Security.*

Approved September 9, 1891.

JAMES T. JONES, *Clerk.*

Indorsed: Filed September 9, 1891. James T. Jones, clerk.

33 Following is opinion of Judge Allen filed in clerk's office of said court:

United States Circuit Court, Southern District of Illinois, June Term, 1891.

AUGUSTUS T. POST
vs.
THE COUNTY OF PULASKI. } Trespass on the Case on Promises.

Connolly & Mather, for plaintiff.
Brown, Wheeler & Brown and L. M. Bradley, for defendant.

ALLEN, *Judge:*

This action was prosecuted on one hundred and ninety-six interest coupons attached to thirty-six railroad aid bonds issued by Pulaski county on the 17th day of October, 1872, in part payment of a $100,000 subscription to the capital stock of the Cairo & Vincennes Railroad Company. The subscription was made under the tenth section of the Cairo & Vincennes railroad charter to be found in volume 2 of the Private Laws of the State of Illinois passed in 1867, and is as follows:

An act to incorporate the Cairo and Vincennes Railroad Company. Private Laws of 1867, vol. 2.

SECTION 10. "The several towns or counties through or near which said railroad shall pass, may subscribe for and take stock in this company, and may issue bonds in payment of such stock of five hundred dollars each, bearing interest at the rate of eight (8) per cent. per annum, or less, payable half yearly in the city of New York, on the first days of January and July of each year, and bonds to not run longer than twenty-five years, and a tax of not more than one dollar on each one hundred dollars' worth of taxable property, may be levied and collected in such town, city or county, per annum to pay the installments on such stock, or to pay the interest and principal of bonds issued in payment for such stock; provided, that no such subscription shall be made, no such bonds shall be issued and no such tax shall be levied unless a majority of the legal voters of said town, city or county shall vote for the same at an election to be held under order of the corporate authorities in cases of towns and cities and of the county court in cases of counties.

Provided, further, that a majority of the legal voters at any such election shall be held as a majority of the legal voters of any such town, city or county, and the questions of making a subscription, issuing bonds and levying taxes may be submitted as one
34 question or as separate questions at such election, and either or all of said questions may be submitted to an election at any time, in the discretion of the authorities authorized to call such election."

One of the principal questions arising in the case is as to whether it devolved upon the plaintiff to prove on the trial that notice of the election under which the subscription was made had been duly given. No sufficient evidence to establish that fact was offered, and the plaintiff's contention is, first, that under the tenth section of the

charter above quoted authority is expressly given to the county to subscribe stock, and that a notice of the election was not necessary.

Second. That if such notice was necessary the legal presumption is that it was given; and

Third. That the county authorities, having recited on the face of the bonds that the election was held pursuant to law, are now estopped from denying that there was the proper legal notice.

The first is deemed insufficient. The right of the county to subscribe stock, it is admitted, rests upon the power conferred by the tenth section of the charter. This section contains the proviso: "That no such subscription shall be made, no such bonds shall be issued, and no such tax levied unless a majority of the legal voters of town, city, or county shall vote for the same at an election under the order of the corporate authorities in case of towns and cities and of the county court in case of counties." The right of subscription is made to depend upon the express consent of a majority of the legal voters of the county. Every principle of safety and justice necessarily requires a majority of the legal voters to consent to the imposition of so great a burden as the creation of a debt to the amount of one hundred thousand dollars, bearing interest at the rate of eight per cent. per annum, in aid of a quasi-private enterprise. Such municipalities as counties were not created to engage in commerce generally, or to assist in building railroads, but for governmental purposes only. The right to subscribe, then, depends upon the clearly expressed will of the legal voters at an election held under the order of the county court. But can there be a fair and valid election without notice? The legal voter is entitled to know when, where, and upon what matter he is called upon to vote. This would seem to be fundamental. All legal elections must be held under some law. If there was nothing said in the charter about notice the general railroad aid law of 1849 was in full force requiring thirty days' notice of such an election, and it at least should have been observed. Harding *v.* The Rockford, R. I. & St. Louis R. R. Co. *et al.*, 65 Ill., 90.

Now, can the second be accepted? The general proposition
35 that public officers are always presumed to do their duty is not denied, but such presumption cannot waive the indispensably necessary proof in this case. The adoption of the constitution of 1870 marked a new era in the policy of Illinois with reference to municipal subscriptions and indebtedness, providing, as it did, that "No county, city, town, or township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized, under existing laws, by a vote of the people of such municipality prior to such adoption." Since that time all bonds issued by this class of corporations are *prima facie* invalid, and the burden is clearly thrown upon those affirming their validity of proving they were authorized by a vote of the people of the municipality under the existing laws. The power to make subscriptions was expressly

denied in any and every case but such as might be saved by the proviso, and the one claiming a right saved by an exception or proviso in a statute must show affirmatively that the right so claimed is clearly within the proviso or exception, otherwise the presumption is that it is embraced in the enacting clause. The subscription in this case was not made till the 4th day of March, 1872. In the People *ex rel. v.* Johnson County, 92 Ill., 411, it was said: "We are unable to find any evidence that notices were posted in any portion of the precincts, and the evidence as to the election subsequently held in 1869 is equally loose, indefinite, and unsatisfactory in its character. The burden was upon the relator to prove that the notices were given. It being a special election and the exercise of a special power, a compliance with the authority must be shown and cannot be inferred." Inferences and presumptions of the character relied on are not sufficient to uphold the subscription.

The third reason, estopped by recitals in the bonds, strongly urged and relied on by plaintiff's counsel, is equally unsatisfactory. It may be conceded, as a doctrine well established, that municipal officers are bound by recitals in their bonds as to all matters affecting the regularity of proceedings which they have passed upon, but it would certainly be a dangerous doctrine to maintain that they are estopped from denying their legal power or authority to make the same. These officials are the financial agents of the people, clothed with the limited power of executing or performing some trust or duty. If no power has been granted or voted them in any contingency to do acts or execute instruments, creating or evidencing previous indebtedness upon the city, town, or county, will their recitals on the face of the instruments, that they are executed in pursuance of law or sufficient authority, make binding obligations of such instrument as without the recitals would

36 be utterly void? This cannot be the law. Such a rule affords no safety or security to the tax-payer. The plaintiff in this case may be regarded as a *bona fide* or innocent holder of the bonds or coupons, and may suffer to the extent of the money he paid for the same, and yet it is far better that he should do so than to recognize the doctrine that municipal officers without authority may, by placing on the face of their bonds untrue statements, thereby bind the people to pay them. The plaintiff should not have relied on the recitals in the instruments, but it was his duty to examine into the question of power on the part of the Pulaski county commissioners to make the bonds. He was bound to take notice of the want of power. This is an old, a safe, and a familiar doctrine, repeatedly recognized by the Supreme Court of the United States and the supreme court of the State of Illinois. The latter tribunal has often held to the effect just indicated. Chief Justice Waite, delivering the opinion of the court in Douglas *v.* County of Pike, 101 U. S., 677, said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the statute itself;" and in German Bank *v.* Franklin County, 128 U. S., 526, it is laid down that "this court must recognize this decision of the supreme court

of Illinois as an authoritative construction of the statute made before the bonds were issued, and to be followed by this court." Before the bonds were issued from which the coupons sued on were taken the supreme court of Illinois in Harding *v.* R. I. and St. Louis R. R. Co., 65 Ill., 90, *supra*, had held that "if any general or special statute which controlled the election required the publication or posting of a notice for thirty days prior to the holding of an election, and this was not done, then the election was invalid, and the expression of the will of the voters thus obtained conferred no power upon the board of supervisors either to make the subscriptions or to issue the bonds;" and of this holding plaintiff was bound to take notice when he purchased his bonds; and, lastly, plaintiff contends that his right to recover is confirmed by the 3d section of "An act to amend an act entitled An act to incorporate the Cairo and Vincennes Railroad Company, approved March 6, 1867, and for other purposes," which provides, among other things, that "all orders for and notices of elections and returns of such elections, in respect of such subscriptions of stock to said company, in any such towns, cities, or counties, are hereby declared to be valid and binding upon such towns, cities, or counties." Private Laws of Illinois, 1869, vol. 3, page 259. A curation act similar in many of its provisions, and really intended to effect the same purposes, was passed upon
37 in Jonesboro *v.* Cairo & St. Louis R. R. Co., 110 U. S., 192, and it was then held that the General Assembly of Illinois had power to pass such a law, and that the phrase "under existing laws" in the section of the Illinois constitution referred to related to the time of the adoption of the constitution rather than to the time when the vote of the people was, in fact, taken.

The supreme court of Illinois at the June term, 1879, held in Gaddis *v.* Richland County, 92 Ill., 119, that such curative acts were vicious and unsupported by constitutional authority, saying that "When it is remembered that their elections were held without power (no sufficient notice having been given) in the body ordering them, as they conferred no more power than if they had never been held, it is apparent that this subscription is as clearly unauthorized as if the legislature had recited that ten or any other number of citizens of the county had come together and voted to subscribe $200,000 to the stock of the road, and it is a legal election, and commanded the board to subscribe for the stock and issue the bonds. It was in legal effect precisely as though no effort had ever been made to hold an election and it gave no validity to the bonds."

The Illinois supreme court has also frequently held that the saving clause in the proviso, separate section 2 of the constitution of 1870, in regard to municipal subscriptions, to the effect that the section shall not affect the right to make such subscriptions when the same have been authorized "under existing laws" prior to the adoption of the constitution, refers to and embraces subscriptions that had been authorized by a vote of the people under laws existing at the time the vote was taken. The People *ex rel. v.* Jackson County, 92 Ill., *supra*; Williams *v.* The People *ex rel.* Collector, 132 Ill., 574.

No other construction by the courts of Illinois it is believed has

ever been given to this section of their constitution, and it is evident that the case of The People *v.* Jackson County, in 92 Illinois, was not cited or considered by the Supreme Court of the United States when the construction of the Illinois constitution was given in Jonesboro' City *v.* Cairo & St. Louis R. R. Co., *supra*. The desire of the Federal courts to act in harmony with the State courts is strong, and will always prevent the former from conflicting with the latter in the construction of their own constitutions and statutes in all cases where the State courts have first given such a construction. The courts of Illinois having with reference to the constitutional article and the legislative curative act held adversely to plaintiff's right to recover, their decisions will be followed and a judgment rendered for the defendant.

38 UNITED STATES OF AMERICA, } *ss*:
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of all the papers filed and proceedings therein had in a certain case wherein Mary E. Post, executrix of the estate of Augustus T. Post, deceased, is plaintiff and The County of Pulaski is defendant, as truly and completely as the same appear of file and record in my said office.

In witness whereof I hereunto set my hand and seal of said court, at Springfield, in said district, on this 28th day [SEAL.] of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth year.

JAMES T. JONES, *Clerk.*

THE UNITED STATES OF AMERICA, *ss*:

To the County of Pulaski, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the seventh circuit, to be holden at Chicago on the first Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois, wherein Mary E. Post, administratrix of estate of Augustus T. Post, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. William J. Allen, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this 28th day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth year.

WILLIAM J. ALLEN,
U. S. Dist. Judge.

We hereby accept service of this citation this 28th day of September, A. D. 1891.

BROWN, WHEELER & BROWN,
Att'ys for Def't in Error.

38½ (Endorsed:) Transcript of record. United States circuit court of appeals for the seventh circuit, October term, A. D. 1891. No. 12. Mary E. Post, adm'x of estate of A. T. Post, deceased, plaintiff in error, *vs.* County of Pulaski, defendant in error. Error to the circuit court of the United States for the northern district of Illinois, northern division. Filed October 19, 1891. Oliver S. Morton, cl'k.

39 In the United States Circuit Court of Appeals for the Seventh Circuit.

TUESDAY, *January* 19, 1892.

MARY E. POST, Adm'x of Estate of A. T. Post, Deceased, Plaintiff in Error,
v.
COUNTY OF PULASKI.

Now come the parties, by their counsel, and now comes on to be heard this cause upon the printed record, briefs, and oral arguments of counsel, and the court—Hon. Walter Q. Gresham, circuit judge; Hon. Henry W. Blodgett, district judge, and Hon. James G. Jenkins, district judge, sitting—having heard the same, takes this cause under advisement.

40 United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1891.

MARY E. POST, Administratrix, &c., *vs.* COUNTY OF PULASKI. } Signed January 19, 1892, Before JJ. Gresham and Blodgett.

BLODGETT, *J.*:

This is an action of assumpsit upon one hundre- and ninety-six interest coupons of $20 each cut from thirty bonds of the defendant county, said bonds being for the sum of $500 each, of like tenor, all dated October 17, 1872, payable twenty years after date, with interest at the rate of 8 per cent. per annum, payable on the first days of January and July in each year, as evidenced by coupons attached, said bonds being a part of an issue of two hundred bonds of like tenor and amount issued by the defendant county in aid of the construction of the Cairo & Vincennes railroad.

Defendant pleaded the general issue and filed with its plea an affidavit denying the execution by the county of the instruments sued upon.

By stipulation in writing between the parties a jury was waived and the case tried by the court, who found the issues for the defendant and entered judgment upon the finding.

The evidence in the bill of exceptions and the opinion of
41 the court below, which is found in the record, shows that the case was heard and considered solely upon the question of the power of the county to issue the bonds from which the coupons in question were cut.

The bonds in question each contain the following recital: "This bond is one of two hundred of like tenor and amount, of the same issue, and is issued pursuant to an order of the county court of said county, authorized by a majority of the legal votes cast at an election held in said county pursuant to law, on the 5th day of November, A. D. 1867. This bond is also issued under the provisions of 'An act to incorporate the Cairo & Vincennes Railroad Company,' approved March 6th, 1867, and under the provisions of an act to amend said act, approved February 9th, 1869; also under the provisions of an act entitled 'An act to fund and provide for the payment of the railroad debts of counties, townships, cities, and towns,' approved April 16th, 1869, and is in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company in the total sum of one hundred thousand dollars."

The special statutory authority for the issue of bonds by the county in aid of the railroad named is found in the tenth section of the act of the General Assembly of Illinois, approved March 6, 1867, entitled "An act to incorporate the Cairo & Vincennes Railroad Company" (Private Laws of 1867, vol. 11, p. 561), as follows: "The several towns, cities, or counties, through or near which said
42 railroad shall pass, may subscribe for and take stock in this company, and may issue bonds in payment for such stock of five hundred dollars each, bearing interest at the rate of eight per cent. per annum or less, payable half yearly in the city of New York, on the first days of January and July of each year, and bonds to run not longer than twenty-five years. And a tax of not more than one dollar on each one hundred dollars' worth of taxable property, may be levied and collected in such town, city or county per annum, to pay the installments on such stock, or to pay the interest and principal of bonds issued in payment for such stock: Provided, that no such subscription shall be made, no such bonds shall be issued, and no such tax shall be levied, unless a majority of the legal voters of said town, city or county, shall vote for the same, at an election to be held under order of the corporate authorities in cases of towns and cities, and of the county court, in cases of counties: Provided, further, that a majority of legal voters at any such election, shall be held as a majority of the legal voters of any such town, city or county; and the questions of making a subscription, issuing bonds, and levying taxes, may be submitted as one question, or as separate questions at such election; and either or all of said questions may be submitted to an election at any time, in the discretion of the authorities authorized to call such election."

Power is also given a municipal corporation to issue bonds
43 in payment of subscription to the stock in railroad corporations by an act approved November 6, 1849, entitled "An act

supplemental to an act entitled An act to provide for a general system of railroad incorporations."

Without discussing all the questions made on the argument of the case we think the record shows one so obvious ground for sustaining the judgment of the court below that no other need be considered.

The bonds recite that they are issued "pursuant to an order of the county court of said county * * * in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company." This recital that the bonds were issued pursuant to an order of the county court undoubtedly put all persons dealing in the bonds on inquiry as to the terms of that order. An examination of the records of the county court of the county would have shown, as clearly appears from the proof in this case, that on the 17th of September, 1867, the court ordered that an election be held in the county at the various voting precincts on the 5th day of November, 1867, to vote upon the question of subscribing the sum of $100,000 to the capital stock of the Cairo & Vincennes Railroad Company and the issue of the bonds of the county in the denominations of $500 each, payable in twenty years, bearing interest at 8 per cent. per annum, payable half yearly on the first days of January and July in each year, in payment for such stock.

44 And that on the second day of December, 1867, the county court entered into a contract with the railroad company which recites that "at an election held in the county on the 5th of November, 1867, the county court was authorized to make a subscription of $100,000 to the capital stock of said railroad company and to pay for said stock in bonds of the county." It was therefore agreed that the county should sell to the railroad company the $100,000 of stock so to be issued to the county in payment for said bonds for the sum of $5,000 in bonds—in other words, that the county should give $95,000 of its bonds for $5,000 of stock in the railroad company.

And by orders of the county court entered upon their records at the July term, 1870, June term, 1871, and March term, 1872, which in terms purported to extend from time to time the period within which the railroad should be completed and yet be entitled to receive the bonds, this provision in regard to the sale of the stock to the railroad company was retained in full force.

No actual subscription by the county for the stock of the railroad company was made until March 4, 1872, when the county court for the first time made a subscription for the $100,000 of the stock of the railroad company, and in the order making this subscription it was expressly provided that the subscription should in no way invalidate the contract then in force between the county and the railroad company by which the capital stock received by the county is sold to the railroad company; and in a subsequent

45 order, entered the same day, in regard to the same subject-matter is the following paragraph: "And it is further agreed that upon the completion of said road and the delivery of said bonds upon the terms and conditions hereinbefore expressed this

county will accept and receive the balance of said sum of $100,000, to wit, $5,000, due to said company in full payment for the sum of $100,000 stock in said road, and will waive the actual issue thereof to said county."

There can be no doubt that the legal effect of this contract and the orders of the county court was to donate or give the railroad company $95,000 in the bonds of the county. The county was to receive no stock, but was to give the railroad company $95,000 of its bonds.

The election held on the 5th of November, 1867, was to vote upon the question of subscribing for $100,000 of the stock of the company and issuing the bonds of the county in payment therefor.

No special or general statute of the State then in force authorized the county to make a donation of its money or bonds in aid of this railroad company.

That there is an essential difference between a proposition to subscribe for stock in a railroad company, and thereby become a stockholder, with a right to share in the profits of its business and have a voice in the management and policy of the company, and a proposition to make a donation of bonds or money to the railroad
46 company is too plain to require argument or the citation of authority. The order of the county court making the subscription to the stock and directing the issue of the bonds, and which must be read into each bond and coupon, shows in unmistakeable language, so plain that it requires no technical skill to construe or apply it, that the bonds were issued as a donation to the railroad company and not in payment of a subscription to its stock.

The case of Choisser *vs.* The People, &c., lately decided by the supreme court of Illinois, the manuscript opinion of which has been handed to us since the argument of this case, is almost identical in its facts, as far as the question now under consideration is concerned, with this case. It involved an issue of bonds by another county (Saline) in aid of the construction of the same railroad and in pursuance of the same section of the charter of the railroad company.

An agreement between that county and the railroad company was made after the vote authorizing the subscription in substantially the same terms as *was* made in the case now under consideration, and in that case the court, speaking by Mr. Justice Bradley, says in regard to this contract: "That in its consummation, if not in its inception, the transaction was a donation pure and simple is too plain to admit of serious controversy. In the beginning and until the election was had the guise of a subscription was resorted to so as to bring the municipal aid sought to be obtained, ap-
47 parently at least, within the power conferred upon the county by the tenth section of the railroad company's charter; but when viewed in the light of the interpretation put upon the transaction by the subsequent acts of the parties it appears too transparent to mislead. The bonds being essentially a donation, it was not within the power of the county court to issue them, and they must, therefore, be held to be *ultra vires* and void."

It is further urged in behalf of the appellant that the action of the

county court in making the contract in question with the railroad company was validated by the third section of "An act to amend an act entitled An act to incorporate the Cairo & Vincennes Railroad Company," approved February 9, 1869 (Private Laws of Illinois, 1869, vol. 3, p. 259). This section provides: "That all contracts made by towns, cities, and counties into, through, or near which the Cairo & Vincennes railroad shall run whereby, as an inducement for the construction of said railroad, such towns, cities, and counties agreed, upon the completion of certain portions of said railroad, to sell to the said company at a nominal price the stock of said company for which such towns, cities, or counties, by a vote of their electors, had theretofore subscribed and agreed to issue bonds in payment therefor, thereby in effect agreeing to make a donation to said company of certain amounts of the bonds of such towns, cities, or counties as an inducement for the construction of said railroad, are hereby declared to be valid and binding upon such towns,
48 cities, and counties, and shall be carried into effect in good faith by the same, and all orders for and notices of elections and elections and returns of such elections in respect to such subscriptions of stock to said company in any such towns, cities, and counties are hereby declared to be valid and binding upon such towns, cities, or counties."

In reference to the validity of this statute we cannot express our own views more clearly or forcibly than by quoting from the opinion of the learned judge in the case just referred to, in which he says: "The only proposition which had been submitted to the vote of the people of the county, and the only proposition which under existing laws the county court had power to submit to them, was that of making a subscription to the capital stock of the railroad company, the stock to be received as a consideration, and, presumably, the equivalent for the county bonds to be issued in pursuance of the subscription.

"The proposition to donate $95,000 in county bonds to said railroad company was never submitted to the people of said county, was never voted upon by them, and could not under then existing laws have been submitted to such vote. The subsequent contract entered into by the county court to sell back the stock subscribed for for a nominal consideration so as to effectually transmute the proposition to subscribe $100,000 to the capital stock of said company, to which the people of the county had given their assent, into a prop-
49 osition to donate to the railroad company $95,000 of county bonds to which the people of the county had not and could not have given their assent was clearly void, so as to confer no rights or impose no obligations. * * * In the present case the amendatory act of 1869, if effectual at all, can be held to operate only by way of validating a contract for a donation which, by reason of want of power, as well as the absence of either an intention or opportunity on the part of the legal voters of the county to give their assent to it, was *ultra vires* and void.

"Declaring such void contract to be valid and binding, and providing that it should be carried into effect in good faith, as said amend-

atory act undertook to do, was an attempt to impose upon the county an obligation in aid of the railroad without its own consent expressed in any legal form."

For these reasons we are of opinion that whoever dealt in those bonds is chargeable with notice from the records of the county court of Pulaski county that the bonds were donated to the railroad company and were not issued by the county in payment of a subscription to the stock of the company. The recitals in the bonds that they were issued pursuant to an order of the county court put whoever should come into possession of these bonds, even if purchased for value upon the open market, upon inquiry as to the terms of that order, and it needs no judicial interpretation of the contract referred to in the orders of the county court to see that the
50 county did not in legal effect subscribe for the stock of this railroad, but agreed to donate and did donate its bonds in aid of this railroad.

The decree of the court below is therefore affirmed.

Opinion filed March 8, 1892.

Messrs. Connolly & Mather and John F. Dillon, for plaintiff in error; Mr. Sam'l P. Wheeler & Mr. L. M. Bradley, for defendant in error.

(Endorsed:) Filed March 8, 1892. Oliver T. Morton, clerk.

51 In the United States Circuit Court of Appeals for the Seventh Circuit.

TUESDAY, *March* 8, 1892.

MARY E. POST, Adm'x of Estate of A. T. Post, Deceased,
Plaintiff in Error,
v.
COUNTY OF PULASKI. } Error.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is affirmed with costs, and that the said defendant recover against the plaintiff, Mary E. Post, adm'x, etc., for its costs herein expended, and have execution therefor.

52 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing fifty-one pages, numbered from one to fifty-one, inclusive, contain a true copy of the complete record in the case of Mary E. Post, adm'x, etc., plaintiff in error, *vs.* County of Pulaski, No. 12, October term, 1892, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 20th day of April, A. D. 1892.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, 1891.

No. 12.

MARY E. POST, ADMINISTRATRIX OF THE ESTATE OF A. T. POST, DECEASED,

Plaintiff in Error,

vs.

COUNTY OF PULASKI.

ERROR TO THE CIRCUIT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,

Of Counsel for Plaintiff in Error.

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, 1891.

No. 12.

MARY E. POST, Administratrix of Estate of A. P. Post, deceased, Plaintiff in Error,

vs.

COUNTY OF PULASKI.

Brief for Plaintiff in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Statement of the Case.

I propose to state here only the material facts in the case as they present the questions of law which are discussed in this brief. For a fuller statement of the case I refer to the brief filed by Messrs. CONNOLLY & MATHER on behalf of the plaintiff in error.

The case was tried by the Court under a stipulation in writing waiving a trial by jury (Record, p. 9). The bill of exceptions contains the special findings of fact made by the Court (Record, pp. 26–28) and the decision

of the Court thereon. The facts in the case, so far as it is necessary to state them, are as follows:

The plaintiff is the *bona fide* holder of the 196 coupons in question, cut from 36 bonds of Pulaski County, Illinois, which bonds and coupons were offered and received in evidence in the case. The bond is set out at length in the Bill of Exceptions (Record, p. 12). The bond recites, among other things, that it is issued under the provisions of an act to incorporate the Cairo and Vincennes Railroad Company, approved March 6th, 1867, and under the provisions of an act to amend said act, approved February 9th, 1869; also under the provisions of an act entitled "An Act to fund and provide for the payment of the railroad debts of counties, townships, cities and towns," approved April 16th, 1869.

Section 10 of the Act of March 6th, 1867, is as follows:

"The several towns or counties through or near which said railroad shall pass may subscribe for and take stock in this company, and may issue bonds in payment of such stock of five hundred dollars each, bearing interest at the rate of eight (8) per cent. per annum, or less, payable half yearly in the City of New York, on the first days of January and July of each year, and bonds to not run longer than twenty-five years, and a tax of not more than one dollar on each one hundred dollars' worth of taxable property may be levied and collected in such town, city or county per annum to pay the installments on such stock, or to pay the interest and principal of bonds issued in payment for such stock; provided, that no such subscription shall be made, no such bonds shall be issued, and no such tax shall be levied unless a majority of the legal voters of said town, city or county shall vote for the same at an election, to be held under order of the corporate authorities in cases of towns and cities, and of the county court in cases of counties.

"Provided, further, that a majority of the legal voters at any such election shall be held as a majority of the legal voters of any such town, city or county, and the

questions of making a subscription, issuing bonds and levying taxes may be submitted as one question or as separate questions at such election, and either or all of said questions may be submitted to an election at any time, in the discretion of the authorities authorized to call such election."

2 Illinois Private Laws, 1867, p. 561.

This section, it will be noticed, expressly confers the power to issue bonds such as the bonds in question.

The amendatory act of February 9, 1869, above referred to, is as follows:

"SEC. 3. Be it further enacted, that all contracts made by towns, cities and counties, into, through or near which the Cairo and Vincennes Railroad shall run, whereby, as an inducement for the construction of said railroad, such towns, cities and counties agreed, upon the completion of certain portions of said railroad, to sell to the said company, at a nominal price, the stock of said company for which such towns, cities or counties, by a vote of their electors, had theretofore subscribed, and agreed to issue bonds in payment thereof, thereby, in effect, agreeing to make a donation to said company of certain amounts of the bonds of such towns, cities or counties, as an inducement for the construction of said railroad, are hereby declared to be valid and binding upon such towns, cities and counties, and shall be carried into effect, *in good faith, by the same; and all orders for and notices of election, and elections and returns of such elections, in respect to such subscriptions of stock to said company, in any such towns, cities and counties, are hereby declared to be valid and binding upon such towns, cities or counties.*

3 Illinois Private Laws, 1869, p. 259.

There were also offered in evidence and set out in the bill of exceptions various orders of the County Court of Pulaski County (Record, pp. 13-20). The order for the election, which shows what the people were to vote upon and did vote upon, was made "Tuesday, September 17, 1867" (Record, p. 13), and is as follows:

"Be it hereby ordered that the order made on the

4th day of September, 1867, for an election to be held on the 7th day of October, 1867, upon the question of issuing bonds for the Cairo, Mound City and Vincennes Railroad, be and the same is hereby rescinded; whereupon it is ordered by the Court that the following order be made: 'It is hereby ordered by the Court that an election be held in Pulaski County at the various voting precincts of said county, on the 5th day of November, 1867, upon the following questions, to wit:

"'1st. That Pulaski County subscribe the sum of one hundred thousand dollars to the capital stock of the Cairo and Vincennes Railroad Company.

2d. That in payment of said subscription of one hundred thousand dollars to the capital stock of said Cairo and Vincennes Railroad Company bonds of Pulaski County be issued to said railroad company in the denomination of five hundred dollars each, said bonds to bear interest at the rate of eight per cent. per annum, payable half-yearly on the first days of January and July of each year in the City of New York, said bonds to run twenty years, and the faith of the County of Pulaski to be pledged for the payment of the principal and interest thereof, said bonds redeemable at any time at the pleasure of the county.

3d. That a tax of not more than one dollar on each hundred dollars' worth of taxable property of Pulaski County shall be levied to pay the interest and principal of said bonds when issued. Said bonds to be issued to said company whenever ten miles of the track of said road has been laid from Cairo northward, and cars have run on said track.

It is further ordered by the Court that all of said questions be voted upon as one question, and all voters of Pulaski County who favor the adoption of said proposition shall have written upon their tickets, "for subscription to Cairo and Vincennes Railroad Company;" and all voters of Pulaski County who oppose the adoption of said proposition shall have written or printed upon their tickets "against subscription to Cairo and Vincennes Railroad Company."

Note that the form of the vote submitted to the people and adopted by them does not prescribe any condition to the issue of the bonds, unless it be the condition in the third paragraph above quoted, that said bonds be issued to said company whenever ten

miles of the track has been laid, &c., which condition has been performed, as was found as a fact by the Court (Record, p. 27). This was the only condition, and there was no limitation to the vote as to the time when the condition might be complied with.

IT IS CONTENDED NOW BY THE DEFENDANTS that a thirty days' notice of this election was required by the General Railroad Aid Law of 1849, and that it was incumbent upon the plaintiff to prove that such notice had been given. This, as I understand, is the main contention of the defendant, and that for this alleged defect the Court below held that the bonds were not valid even in the hands of *bona fide* holders. This question will be considered at length *infra*; but in passing it is worth while to note that between the time when the order for the election was made, Tuesday, September 17th, 1867, and the date of the election, November 5th, 1867, there was ample time for the giving of the thirty days' notice.

That part of the Act of November 6, 1849, which, it was decided by the Court below, prescribes the giving of notice is as follows:

"SEC. 4. No subscription shall be made, or purchase or bond issued, by any county or city under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this Act for county officers), shall vote for the same; and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days' notice, in the same manner as notices are given for election of state or county officers in said counties," etc.

Illinois Laws, 1849 (Oct. Session), p. 33.

At a term of the County Court, December 2d, 1867, the County Court entered into a contract with the Cairo and Vincennes Railroad Company, which is set out in the Record, pp. 14–16, in reference to the construction of the road and the issue of the bonds in payment of a subscription to the capital stock. After some delays and several orders of the Court extending the time for the completion of the railroad, which are set out in the record, pages 16 to 20, the County Court, on the second day of September, 1872, made an order as follows (Record, p. 20):

"In the matter of the Pulaski County bonds to be issued to the Cairo and Vincennes Railroad Company.

"The County Judge and County Clerk of Pulaski County are hereby expressly ordered not to issue or sign or execute and [any] bonds upon the County of Pulaski to the Cairo and Vincennes Railroad Company which does not strictly conform to the order of this Court heretofore made at the March Term, A. D. 1872, of this Court, and the said County Judge and County Clerk are further ordered to execute no bond or bonds upon the County of Pulaski to said railroad company, until such bond shall have been first submitted to this Court and Board for inspection and approval."

It will be noticed that this order required that no bonds be issued by the county to the railroad company until submitted to the Court for inspection and approval. After such inspection and approval was had the Court made an order for the delivery of the bonds, as follows (Record, p. 20):

"Order for the delivery of the county bonds to A. B. Safford, trustee, &c. Whereas, the bonds of Pulaski County in aid of the Cairo and Vincennes Railroad Company have been duly submitted and inspected by this Court and found satisfactory, it is therefore ordered, that the bonds in the sum of ninety-five thousand dollars be duly executed by the County Judge and County Clerk and a registry thereof made, and that said bonds, together with a certified copy of the order and conditions upon which the same are to be delivered

to the Cairo and Vincennes Railroad Company, to be placed in the hands of A. B. Safford, Esq., cashier of the City National Bank of Cairo, in trust for the benefit of said Pulaski County and said Cairo and Vincennes Railroad Company."

The Court below, in its special findings of fact (Record, p. 27), found that these orders above referred to were made as appears in the evidence in the record. The Court further found (Record, p. 27):

"That the order of the County Court calling an election for the purpose of voting for or against subscription to the capital stock of said Cairo and Vincennes Railroad Company, makes no provision for giving any notice of said election, and the plaintiff neither offered nor introduced any evidence, *dehors* said records and bonds, tending to prove that any notice of said election, or holding thereof, was even (ever) given."

The Court below further found (Record, p. 27):

"SEVENTH. The Court further finds that each of the bonds in evidence recites upon its face 'that the same is issued pursuant to an order of the County Court of said county, authorized by a majority of the legal votes cast at an election in said county, pursuant to law, on the 5th day of November, A. D. 1867,' and 'is also issued under the provisions of' an act 'to incorporate the Cairo and Vincennes Railroad Company,' approved March 6th, 1867, and under the provisions of an act to amend said act, approved February 9th, 1869, also under the provisions of an act entitled 'An Act to fund and provide for the payment of the railroad debts of counties, townships, cities and towns,' approved April 16th, 1869, and that each of said first mentioned acts was offered and received in evidence and read as found on pp. 552 to 562, 2 Vol. Priv. Laws., Ill., 1867, and pp. 256 to 261, Vol. 3, Priv. Laws, Ill., 1869, respectively."

Upon these facts, as found, the plaintiff requested the Court to hold as a conclusion of law (Record, p. 28):

"That, in view of the recitals in plaintiff's bonds in

evidence and of the provisions of the law recited therein, and of the recitals in the county records in evidence, and of the completion of the road as found, and in view of the plaintiff being a *bona fide* holder of said bonds and coupons as found, that plaintiff is entitled to judgment for the amount of his coupons in evidence.

"Which proposition of law the Court denied and refused to hold.

"To which denial by the Court and refusal to so hold the plaintiff then and there took exceptions and still excepts.

"Whereupon the Court rendered judgment for the defendant upon said special findings and filed a written opinion, to which judgment in favor of defendant plaintiff then and there excepted and still excepts."

ARGUMENT.

I.

The Court below erred in holding that the burden of proof was upon the plaintiff to show that a thirty days' notice of the election had been given; the execution of the bonds with their recitals of the election held "pursuant to law" are prima facie evidence that the notice of the election was given; and, even if the question on the trial was open to consideration after such recital, still the burden of proof was upon the defendant to show that no notice was given.

THE DEFENDANT FAILED *to prove that no notice was given.* There is no finding of the Court, nor was there any evidence to prove, that no notice of the election was given. The time between the making of the order for the election, September 17, 1867, and the 5th of No-

vember, 1867, was more than ample for giving the thirty days' notice, and in the absence of any showing to the contrary by the defendant, the recital of the bond that the election was held "pursuant to law" is, in favor of a *bona fide* holder of the bonds, presumptive and perhaps conclusive evidence that such notice was given. The presumption from the recitals that the notice was given, as well as the usual presumption that officers perform their official duties (see *Town of Coloma vs. Eaves*, 92 U. S., 484, *infra*, Point II.), and the failure of any proof on the part of the defendant to the effect that notice was not given, take away all basis of fact upon which the decision of the Court rested. This point is so clear as not to need or admit of extended argument. I will cite but a single authority, though a long list might be given.

The Supreme Court of the United States (Mr. Justice Harlan), in *Montclair vs. Ramsdell*, 107 U. S., 147, says:

"Legislative authority for an issue of bonds being established by reference to the statute, and the bonds having recited that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show, to entitle him *prima facie* to judgment, was the due appointment of the Commissioners, and the execution by them in fact of the bonds. **It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the Commissioners of the authority conferred by statute were in fact performed before the bonds were issued. The one was presumed from the possession of the bonds, and the other was established by the statute authorizing an issue of bonds and by proof of the due appointment of the Commissioners and their execution of the bonds, with recitals of compliance with the statute.**"

There are two distinct propositions: the first is, that

the statutes authorizing the bonds, the records of the County Court introduced in evidence, and the issuing of the bonds by the County Court with recitals of an *election held "pursuant to law"* make a *prima facie* case in favor of plaintiffs, and, even if a notice of election was necessary, *the burden of proving that notice was not given is upon the defendant.* This, at the very least, is true, and yet even this is sufficient to establish plaintiff's right to recover in the present case, for *there was no proof, and no finding, that notice was not given.*

The second proposition is further, that, according to the well settled rule, the statutes authorizing the bonds, the records of the County Court introduced in evidence, and the issuing of the bonds with the recital of an election held "pursuant to law," make a *conclusive* case in favor of the plaintiff as the *bona fide* holder of the bonds and coupons. This is the result of all the cases. I proceed now to consider this proposition under Point II.

II.

The Court below erred in holding that the plaintiff, in order to recover, was required to prove that there had been a notice given of the election of November 5th, 1867, referred to in the plaintiff's bond.

The facts bearing upon this proposition are set forth at length in the statement of facts *(supra)*, as they are specially found by the Court (Record, pp. 27 and 28). These facts are that the plaintiff is the *bona fide* holder

of the coupons sued on ; that the bonds and coupons attached were issued to the Cairo and Vincennes Railroad Company by the County of Pulaski under the acts of the Legislature, the proceedings of the County Court and the vote of the people of the county, as set forth in the statement of facts *(supra)*. The Court specially found that each of the bonds recites upon its face :

> " *That the same is issued pursuant to an order of the County Court of said county, authorized by a majority of the legal votes cast at an election held in said county pursuant to law on the 5th day of November, A. D. 1867.*"

Here, then, is a recital that the issue of the bonds was authorized by a majority of the legal votes cast at an election held by said county *pursuant to law*, on the 5th day of November, 1867. If the provisions of the General Railroad Aid Act of 1849 applied and a thirty days' notice of the election was necessary, then the due giving of this notice was one of the things which the bonds expressly recite as having been done. *Then, again, this very question was passed upon by the duly constituted tribunal for the determination of this and other like questions.* The mere issuing of the bonds by the County Court would, within all the authorities, be a sufficient decision by that tribunal that the bonds, and the proceedings leading to their issue, were regular. But in the present case there is the further fact, shown by the orders of the County Court quoted in Statement of Facts, *supra*, that that Court—" the duly constituted tribunal "—first forbade the issue of the bonds until they were first submitted to it for approval, and after such submission, and upon consideration the issue of the bonds was expressly approved and ordered. The issuing of the bonds and this

recital in the bonds was made by the County Court, which was the duly constituted tribunal to determine upon the regularity of the proceedings leading up to the issue of the bonds. That tribunal was the one appointed by law to decide whether these proceedings had been regular, and its decision, recited in the bonds, is final and conclusive, so far as the rights of a *bona fide* holder of the bonds are concerned. This proposition upon the facts in this case is settled beyond all question by repeated decisions of the Supreme Court of the United States. The precise question here presented was before that Court in the leading case of *Commissioners of Knox County vs. Aspinwall*, 21 Howard, 539. The opinion of the Court in that case states the point as follows (p. 543):

"The ground upon which the want of authority to execute the bonds in question is placed is the alleged omission to comply with the requisition of the statute of 1849, in respect to the notices to be given of the election to be held on the first Monday of March, at which a vote was to be taken for or against a subscription of stock to the railroad company.

"It is insisted that an irregularity or omission in these notices had the effect to deprive the board of this authority, or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election, and not therefore entitled to the character of *bona fide* holders of the securities.

"The act in pursuance of which the bonds were issued is a public statute of a State, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The Court must therefore look into the statute for the purpose of determining this question; and upon looking into it, we see that full power is conferred upon the board to subscribe for the stock and issue the bonds when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that

the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

"This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the Court, in this collateral way, in every suit upon the bond, or coupon attached, or by the Board of Commissioners, as a duty imposed upon it before making the subscription?

"The Court is of opinion that the question belonged to this board. The act makes it the duty of the Sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

"We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority had been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."

This case has been cited and followed as the leading authority ever since its decision. It is unnecessary to cite other authorities in support of this proposition; and this brief might end here, but for the fact that the

Court below in its opinion attempted to introduce into the case certain elements which do not belong here and which have no bearing upon the real point in question.

The principles were again affirmed in the recent case of *Comanche County vs. Lewis*, 133 U. S., 198. That was an action at law to recover on coupons. The case on the point in question is fully stated in the opinion of the Court (Mr. Justice BREWER, p. 205):

"Passing to the question of the bonds themselves, the first to be considered are the bridge bonds. The recital is in these words:

"'This bond is executed and issued in pursuance of, and in accordance with, an act of the Legislature of the State of Kansas, entitled "An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2, 1872, and also in accordance with the vote of a majority of the qualified electors of said County of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1884 (1874).'"

"The act referred to therein gave to counties full power to issue bonds for the building of bridges, and prescribed the proceedings, including therein a vote of the people, essential to the vesting of authority in the County Commissioners. The recital that the bond was executed and issued in pursuance of, and in accordance with, that act, and also in accordance with the vote of the majority of the qualified electors, is, within repeated rulings of this Court, sufficient to validate the bonds in the hands of a *bona fide* holder. It shows, in the language of School District vs. Stone, 106 U. S., 183, 'a compliance in all substantial respects with the statute giving authority to issue the bonds,' and does not come within the limitations noticed in that case. Further than that, the bonds are endorsed with the official certificate of the Auditor of the State that the bonds had been regularly and legally issued; that the signatures were genuine; and that the bonds had been duly registered in his office in accordance with the Act of the Legislature of March 2, 1872. Inasmuch as these

bonds were issued after the Act of 1872 went into effect, they fall within the decision in the case of Lewis vs. Commisioners, 105 U. S., 739, rather than within that in the case of Bissell vs. Spring Valley Township, 110 U. S., 162, as to the conclusiveness of the certificate of the Auditor.

"The suggestion that the recitals are not sufficient, because the particular bridge for the building of which the bonds were to be issued is not specified, carries no weight. Power is given by the first section of the Act of 1872 to issue bonds for building bridges, and while the subsequent sections providing for a vote and other preliminaries seem to contemplate that a particular bridge should be the subject of consideration, yet it has never been held by this Court, and ought not to be, that a full and minute detail of all the proceedings is essential to the validity of a recital. The main thing is that the county has promised to pay, and that the people, by their vote, have authorized such a promise for one of the purposes for which, under the statute, they may bind themselves."

In answer to any suggestion that the bonds in the present case should have specifically recited notice of the election, note, that in *Comanche County vs. Lewis*, *supra*, the recital is, "This bond is executed and issued *in pursuance of and in accordance with an act* to authorize counties, &c., to issue bonds *for the purpose of building bridges*," &c. It was objected that the recitals were not sufficient "*because the particular bridge for the building of which the bonds were to be issued was not specified.*" In answer to this objection the Court say (p. 206):

"It has never been held by this Court, and ought not to be, that a full and minute detail of all the proceedings is essential to the validity of a recital."

In *Livingston County vs. Bank*, 128 U. S., 102, the recital was:

"This bond being issued under and pursuant to an order of the County Court of Livingston County, authorized by a two-thirds vote of the people of Chillicothe municipal township."

It was objected (p. 126) "That it does not appear by the findings of the Circuit Court that there was any formal order for the issue of the bonds." In regard to this objection the Court say (p. 127):

"The County Court having been designated by the statute as the proper authority to determine that the conditions existed which authorized the making of the subscription, to be followed by the issuing of the bonds, the fact of the issue of the bonds by the County Court, under its seal, with the recitals contained in the bonds and the other facts above stated, estop the county from urging, as against a *bona fide* holder of the bonds and coupons, the existence of any mere irregularity in the making of the subscription or the issuing of the bonds. On the foregoing facts it must be presumed that the subscription to the stock was made by the County Court in behalf of the township, and the county is estopped from asserting the contrary."

The principles upon which the Supreme Court of the United States have repeatedly acted in cases like the present are well stated in the case of *Oregon vs. Jennings*, 119 U. S., 74. The recital in the bond in that case was that they "were the only bonds issued by the said Town of Oregon under and by virtue of said act" (referring to an act of the Legislature previously mentioned). The vote of the town also, in accordance with section 7 of the act of April 16, 1869, hereinafter referred to, prescribed certain conditions, one of which was the completion and equipment of the first division of the road for which the bonds were issued on or before a certain date, and that condition was not observed. The Supreme Court of the United States, nevertheless, held that in the hands of a *bona fide* holder the bonds were valid. The principle upon which the case was decided is stated, in the opinion of the Court, as follows:

"Within the numerous decisions by this Court on the subject, the Supervisor and the Town Clerk, they being named in the statute as the officers to sign the

bonds and the 'corporate authorities' to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with. They state in each bond that the faith, credit and property of the town are, by the bond, solemnly pledged for the payment of the principal and interest named in it 'under authority of' the Act of March 30th, 1869, reciting its title, and that the sixty bonds, amounting to $50,000, 'are the only bonds issued by said Town of Oregon under and by virtue of said act.' The provision in Section 6 of the act, that the town shall, by its proper corporate authority, annually assess and levy a tax to pay the interest and principal of the bonds, is a warrant for the pledge made in the bonds of the faith, credit and property of the town. The recitals are within the adjudged cases in this court, as to the effect of recitals in bonds, that they are issued 'under authority of' a specified statute, and 'under and by virtue of' that statute, and they estop the town from taking the defense that the first division of the road was not completed by the time specified, as against the plaintiff, as a *bona fide* holder of the bonds."

So, also, the precise question which arises in the present case has already been passed upon by the Supreme Court of the United States in *Humboldt Township vs. Long*, 92 U. S., 642. The point decided is stated in the opinion of the Court as follows:

"*The next question certified is whether the bonds are invalid because of the fact that the election was held within less than thirty days after the day of the order calling for it.*

"The act of the Legislature under which the bonds purport to have been issued (passed in 1870) is the act under which the bonds considered in the case of *Marcy vs. Township of Oswego, supra*, p. 637, were issued. We held in that case that by its provisions the Board of County Commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to

execute and issue the bonds, had been performed, and that their recital in the bonds issued by them was conclusive in a suit against the township brought by a *bona fide* holder. *In so ruling we but decided what had often before been decided, and what ought to be regarded as a fixed rule.* Applying it to the solution of the question now before us, it is plain that the bonds are not invalid, because all the notice of the popular election was not given which the legislative act directed. *The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power.* Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice and whether the requisite majority of votes had been cast in favor of a subscription and consequent bond issue were questions which the law submitted to the Board of County Commissioners, and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued '*in pursuance of* and in accordance with the Act of the Legislature.' Thus the plaintiff below took them without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments."

The recital in the bonds in the present case is that the election was held "*pursuant to law*," like the recital in *Humboldt vs. Long, supra.*

So, also, in *Town of Coloma vs. Eaves*, 92 U. S., 484. Note that this was an Illinois case, and that the questions in it arose under the seventh section of the Act of April 16, 1889, which was in question in the case of *German Savings Bank vs. Franklin County*, 128 U. S., 526 (see case commented on, *infra*). The Town of Coloma purported to issue certain bonds, and its vote prescribed certain conditions upon which the subscription was made. It was contended that these conditions had not been complied with, and therefore the

bonds were void in the hands of *bona fide* holders. The Supreme Court of the United States decided that the recitals in the bond (which had been made by authority of the duly constituted tribunal to decide whether these conditions precedent had been performed) were conclusive in favor of the *bona fide* holder. The Court states its decision on this point as follows:

"And the bonds themselves recite that they 'are issued under and by virtue of the act incorporating the railroad company,' approved March 24, 1869, 'and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, *in accordance with said law*.' After all this, it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. *Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the mat'er has passed into judgment.* The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others—to those not competent to decide it, and which the purchaser is, in general, in no condition to decide for himself. * * *

This position, taken in *Knox vs. Aspinwall*, has been more than once reaffirmed in this Court. It was in *Moran vs. Miami County*, 2 Black, 732; in *Mercer County vs. Hackett*, 1 Wall., 83; in *Supervisors vs. Schenk*, 5 *Id.*, 784; and in *Mayor vs. Muscatine*, 1 *Id.*, 384. It has never been overruled; and, whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox vs. Aspin-*

wall. That, we think, has been so firmly seated in reason and authority that it cannot be shaken. What it is has been well stated in Section 419 of Dillon on Municipal Corporations. After a review of the decisions of this Court, the author remarks: 'If, upon a true construction of the legislative enactment conferring the authority (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the conditions precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation.' This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been made in the bonds issued by them and held by a *bona fide* purchaser is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."

Many of the cases decided by the United States Supreme Court on this point will be found collected in Dillon on Municipal Corporations, Section 522, note 2.

Probably the most recent case in the United States Supreme Court is *Borah vs. Nelson*, 140 U. S., 47. That case was decided, without an opinion, upon the authority of *Harter vs. Kernochan*, 103 U. S., 562, and *Bonham vs. Needles*, *supra*, 103 U. S., 648. The case of *Bonham vs. Needles*, *supra*, is directly in point in the present case.

Among other recitals in the bonds in that case was one that they were issued "*in pursuance of* the authority conferred upon an Act of the General Assembly of the State of Illinois, &c., and an election of the legal

voters of the aforesaid township held on the 10th day of November, 1868, under the provisions of said act."

Referring to the case of *Harter vs. Kernochan, supra*, the Court say (p. 650):

"The chief difference between that case and the present one is that in the former the recorded proceedings of the township distinctly showed that the bonds were voted at a special town meeting, duly called and held to consider the question of their issue, while in this case the records of the township contain no evidence of a township meeting at which the qualified voters assented to the issue of bonds in payment of the donation voted on the 10th of November, 1868, except a certificate of William Book, claiming to be Deputy Clerk of Big Mound Town. In that certificate he states that 'at an election held at the Yates school house, on the 28th day of August, that the majority of the voters present voted in favor of giving bonds to the Southeastern Railway Company for the bonus. This August 28th, 1869.' Several witnesses testify that an election was held. But the correctness of the decree and the validity of the bonds in the hands of a *bona fide* purchaser do not depend upon proof in this suit, that such an election was, in fact, duly called and held, at which the qualified voters assented to an issue of bonds in payment of the donation previously voted.

The statutes which we have mentioned conferred, as we have shown in *Harter vs. Kernochan*, ample authority upon the township to issue bonds in payment of the donation voted, the qualified electors assenting thereto at a regular or special town meeting. The bonds recite that they were issued *in pursuance of the authority* conferred by those statutes. Such recitals import a compliance with the statute, and the township, according to the uniform decisions of this Court, is estopped to assert, as against a *bona fide* holder for value, that such recitals are untrue."

The case of *German Savings Bank vs. Franklin County*, 128 U. S., 526, is not at all in conflict with the authorities here referred to.

1. In that case the decision, as we have stated, *infra* (Point III.), depended upon the express

provision of 7th Section of the Act of April 16th, 1869.

2. *There were no recitals in the bonds* to the effect that the conditions which were allowed by Section 7 of the Act of April 16th, 1869, to be prescribed by the voters had been complied with (Report, p. 542). On this ground the Court expressly distinguished the case from *Insurance Company vs. Bruce*, 105 U. S., 328; *Pana vs. Bowler*, 107 U. S., 529; and *Oregon vs. Jennings*, 119 U. S., 74.

3. Another controlling feature in the case of *German Savings Bank vs. Franklin County* was that the bonds in question in that case had been issued *after* the Section 7 of the Act of April 16, 1869, had been construed by the Supreme Court of the State of Illinois in *Town of Eagle vs. Kohn* 84 Illinois, 292.

Comparing that case then with the present one, it appears in the present case that:

1. The 7th Section of the Act of April 16, 1869, has no application in the present case as no conditions were prescribed by the vote of the people, unless it be the condition that the bonds be delivered when 10 miles of road were completed, which condition was afterwards complied with, as the Court specially found (Record, p. 27).

2. The recitals in the bonds in the present case are full and complete to the effect that the issue of bonds is "authorized by a majority of the legal votes cast at an election held in said county *pursuant to law* on the 5th day of November, A.

D. 1867. There was no proof whatever that due notice was not given.

3. At the time the bonds in the present case were issued there were no decisions of the Supreme Court of Illinois at all affecting the question. Even if it be attempted to show that the case of *Harding vs. Railroad Co.*, 65 Ill., 90, was a decision upon the question now in controversy, still that decision as is shown by the brief filed by Messrs. Connelly & Mather on behalf of the plaintiffs herein, was not handed down until after the bonds in question in the present case were issued. But that decision, as we have show *infra*, Point III., only affirmed the ordinary common law rule that before the issue of the bonds and *as between the original parties*, the issue could be enjoined, if it was shown that due notice of the election was not given. Not only do we show that at the time when bonds in question were issue there were no decisions adverse to their validity by the Supreme Court of Illinois, but we also show that under those decisions the bonds were unquestionably valid in the hands of *bona fide* holders; and, as we maintain, there has been no decision since the issue of these bonds in any degree impeaching this rule upon the facts as they exist in the present case (Point III. *infra*).

See also *Town of Coloma vs. Eaves*, 92 U. S., 484, and comments thereon, *supra*.

These are the well-settled rules upon which the Supreme Court of the United States acts in cases like the present. I proceed to show that, so far as the facts of the present case are concerned, the Courts of Illinois do not differ with the United States Courts.

III.

On the facts of the present case there is no rule in the Courts of Illinois contrary to that stated in Point II., supra.

It is true that in some cases involving municipal bonds, upon which comment will be hereafter made, the Supreme Court of the State of Illinois and the Supreme Court of the United States have taken opposite views. Where they have done so the Supreme Court of the United States has always upheld the rights of the *bona fide* holder of the bonds. But on the facts of the present case there is no difference between the views and decisions of the two Courts. This I proceed to show.

The case of *Harding vs. Railroad Co.*, 65 Ill., 90, was referred to by the Court below. The decision in that case would have been just the same in the United States Supreme Court as it was in the Court of Illinois. There was no question in that case of a *bona fide* holder of the bonds; indeed, the bonds had not been issued. This was a direct proceeding between the original parties to enjoin the issue of bonds, and involved no rights of third parties who were *bona fide* holders. The Court in that case decided that the act under which the bonds were issued required that a notice of the election should be given, and as such notice was not given it enjoined the issue of bonds. After deciding this the Court goes further and says that if the said act under which the bonds were issued had not required notice, still the General Railroad Aid Act of 1849 would apply and would require notice.

But if these bonds had been issued and were in the hands of *bona fide* holders, they would have been valid,

notwithstanding failure to give notice of the election, and notwithstanding the existence and pendency of the suit to enjoin their issue. This very thing occurred. While the injunction was off and pending an appeal to the Illinois Supreme Court in the injunction suit, these Warren County bonds were issued. The question of their validity in the hands of *bona fide* holders came before the United States Supreme Court, in *County of Warren vs. Marcy*, 97 U. S., 96; and that Court, long after the decision of *Harding vs. R. R. Co.*, 65 Ill., 90, decided that in the hands of *bona fide* holders the bonds were valid.

So, also, the case of *The People ex rel. Railroad Co. vs. Jackson County*, 92 Ill., 441, was not a case that involved the rights of *bona fide* holders of bonds. That case was mandamus by the railroad company to compel the county to issue the bonds. It was shown that notice of the election was not given as required, and the writ was refused. This case, too, would have been decided in just the same way in the Supreme Court of the United States.

Further, the law in Illinois upon the point in question in the present case is expressly stated in *Eagle vs. Kohn*, 84 Ill., 292, by its Supreme Court precisely as we here contend that it exists. In that case the *bona fide* holder of coupons brought suit. The Court say (p. 295):

"*Aside from the provision of the statute*, we do not consider that *bona fide* holders for value would be required to take notice of such conditions, or the resolution upon the records of the railroad company, but they would enjoy the protection of *bona fide* holders of negotiable paper; and want of compliance with such conditions or resolution would not constitute any defense as against them."

In that case the vote of the people prescribed certain conditions which had not been complied with, and the express provision of section 7 of the Act of April 16, 1869, the Court held that the bonds were void even in the hands of *bona fide* holders. *But the Court there and in the subsequent cases relied solely and expressly upon the express provision of § 7, Act April 16, 1869,* which has no application to the present case.

THAT THE RULE WHICH PREVAILED IN THE SUPREME COURT OF ILLINOIS AT THE TIME OF THE ISSUE OF THE BONDS IN QUESTION, and long after their issue is the same as the rule in the United States Supreme Court, is perfectly evident from the opinion of the Supreme Court of that State in *Eagle vs. Kohn*, 84 Illinois, 90, just quoted; also from the opinion of the Court in *Burr vs. City of Carbondale*, 76 Illinois, 455, 469–70.

THE CONSTITUTION OF ILLINOIS DOES NOT CHANGE THE ORDINARY RULE SO AS TO REQUIRE PROOF OF NOTICE, OTHER THAN WAS FURNISHED BY THE BONDS AND THE RECORDS OF THE COUNTY COURT.

It seems to have been supposed by the Court below that in some way the provision of the Constitution of Illinois of July 2d, 1870, affects the questions under consideration. The Court there states that "since that time (adoption of Constitution, July 2, 1870) all bonds issued by this class of corporations are *prima facie* invalid, and the burden is clearly thrown upon those affirming their validity of proving they were authorized by the vote of the municipality under the existing laws."

The provision of the Constitution of Illinois referred to is as follows:

"No county, city, town or township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation or make donation to or loan its credit in aid of such corporation; Provided, however, that the adoption of this article shall not be construed as affecting the rights of any such

municipality to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipality prior to such adoption."

This clause of the Constitution of Illinois does not change the rule as to burden of proof or the general rules applicable to municipal bonds. In this respect the Court below was clearly in error. The only effect of the proviso in the above-quoted clause of the Constitution is to save such subscriptions as were *authorized prior to the adoption of the Constitution.* It does not at all change the rule as to proof of the same. It was always necessary, before the Constitution as well as afterwards, to prove an Act of the Legislature authorizing the municipality to make such subscription; and the effect of the Constitution is to provide that if such an act and a vote of the people authorizing such subscription can be shown to have existed prior to the adoption of the Constitution, then the subscription may be made notwithstanding the new provision of the Constitution forbidding the giving of such aid. But when such Act of the Legislature and such vote of the people are shown, then the ordinary rules of commercial law in regard to municipal obligations apply, and the rules of evidence and burden of proof are no different in such a case from what they would have been if the Constitution had never been adopted. Under the provisions of the Constitution the plaintiff makes out his case in the usual manner, except only that the act and the vote authorizing the issue must have been prior to the adoption of the Constitution. In all other respects the proof is the same. He is not obliged to go on and show in detail the performance of every act and formality *in pais* any more after the adoption of the Constitution than before it, and the Constitution does not provide that he shall.

The Supreme Court of the United States has already passed upon this precise question as to whether this Constitution of Illinois made any change in the rule of evidence, and the authority of that tribunal is binding upon this Court. In *Oregon vs. Jennings*, 119 U. S., 74, the Court say (p. 93):

"The provision of Section 12 of Article 9 of the Constitution of Illinois did not introduce any new rule of evidence in regard to the mode of proving in favor of a *bona fide* holder the compliance with the vote of the people, but left the compliance to be established in such a case by the recital in the bonds made by the designated authority."

People vs. Johnson County, 92 Illinois, 441, cited by the Court below on this point, was a case in which a railroad company attempted by mandamus to compel the issue of the bonds. This it will be seen was a direct proceeding between the original parties in which the relator was bound to show that notice had been given. There was no question in that case as to a *bona fide* holder of the bonds, and the case is not at all relevant.

The following cases are decided on the rule laid down in *Eagle vs. Kohn*, 84 Ill., 292, to wit:

Richeson vs. People, 92 Ill., 450.
Prairie vs. Lloyd, 97 Ill., 179.
Onstott vs. People, 123 Ill., 489.
Eddy vs. People, 127 Ill., 428.
German Savings Bank vs. Franklin County, 128 U. S., 526.

and all rest upon the express provision of Section 7 of the Act of Illinois, April 16, 1869, to the effect that

"Any county, township, city or town shall have the right, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with."

The leading case under this section is *Eagle vs. Kohn*, 84 Ill., 292, *supra*, and the others merely follow this case. But that case did not, and did not profess to, overrule the well-settled doctrines of the law as to municipal bonds. On the contrary, the Court expressly says that, *aside from the provision of Section 7*, quoted *supra*, the bonds would be good in the hands of a *bona fide* holder (p. 294).

"*But, irrespectively of the above-cited provision of Section seven of the Act of April 16, 1869, we consider that it would be otherwise as against innocent holders for value, as are these appellees.*

"It is the well-settled doctrine that bonds of this character are to be treated as commercial paper; and this Court has held the coupons attached to them to be negotiable by delivery only, without endorsement. *Johnson vs. County of Stark*, 24 Ill., 75. And, *aside from the provision of the statute, we do not consider that bona fide holders for value would be required to take notice of such conditions*, or the resolution upon the records of the railroad company, but they would enjoy the protection of *bona fide* holders of negotiable paper; and want of compliance with such conditions, or resolution, would not constitute any defense against them.

"*The question, then, we conceive, depends upon the above provision of the Statute of April 16, 1869, giving the right to prescribe the conditions upon which such bonds or subscriptions should be made and declaring that such bonds of subscriptions 'shall not be valid and binding until such conditions precedent shall have been complied with,'* what scope is to be given thereto, whether it is to be confined in its operation to the railroad company to which the bonds shall issue, or extend to innocent holders for value. The words of the statute, by their natural force, apply to bonds under all circumstances, in whosoever hands they may be. Courts are wont to allow to such peremptory language of a statute full force and effect, and where a statute expressly declares that negotiable securities, given under certain circumstances, shall be void, to hold them void, even in the hands of a *bona fide* endorsee. Thus, upon the English Statutes of Anne, declaring that promissory notes and bills of exchange given for an usurious consideration, or for a gaming consideration, should be void, the English Courts put the construction

that the securities were void in the hands of a *bona fide* endorsee without notice. And so this Court has held, under our statute, in respect to a bill of exchange given for a gaming consideration (*Chapin et al. vs. Dake*, 56 Ill., 296)."

* * * * * *

"To give full force and effect to the peremptory words of the statute, and from analogy to the principles and decisions which have been adverted to, we think the proper construction here is, to hold that, by virtue of the express declaration of the statute, the bonds in question are not valid and binding until the conditions named shall have been complied with, even in the hands of innocent holders without notice. Holding thus, the demurrer to the plea should have been overruled instead of being sustained."

If there are any Illinois cases apparently adverse to plaintiff's propositions that do not depend upon the express provisions of § 7, Act April 16, 1869, following *Eagle vs. Kohn, supra*, or some other distinguishing fact, I have not seen them.

Now, in the present case the county *did not* "*prescribe any condition upon which*" the bonds should be issued, unless it was the condition that the bonds be delivered when ten miles of railroad were constructed. If this be deemed a condition, it was without any limit as to time, and the Court specially finds that the ten miles were constructed (Record, p. 27). In the present case, therefore, there were no unfulfilled conditions; and the above cited cases, of which *Eagle vs. Kohn* is the leading case, and which are based expressly upon the provision of § 7, Act of April 16, 1869, have no application.

In *Williams vs. People*, 132 Ill., 574, the record of the County Court (of White County) showed on its face that thirty days could not possibly have intervened be-

tween the time of making the order for the election and the holding of the election.

The case of *Vieley vs. Thompson*, 44 Ill., 12, may, perhaps, be cited by counsel for defendant in error. But that case is not at all in point here. As the questions arose in that case *the issues were between the immediate parties*, just the same as in *Harding vs. R. R. Co.*, 65 Ill., 90, *supra*. *The questions arose as on demurrer to the bill of complaint* (p. 11). The allegations of the bill, then, were to be taken as true, in order to determine the law upon the demurrer. The suit was to enjoin the collection of a tax. From the bill it appeared that the act authorizing the citizens to vote the tax provided for ten days' notice of an election before the vote should be had, and that no notice was given, but the vote was taken the very next day after the act was passed. There was no showing anywhere in the bill of the existence of any *bona fide* holders of bonds, or anything else to prevent the application of the ordinary rule, which is applied as between immediate parties in a case of this kind, which is, that the proceedings must be regular as the statute prescribes. Not only was the present question not involved, it was not even discussed, and could not have been, for the reasons just stated. There were, moreover, other facts alleged sufficient to defeat the tax.

I have shown that the rule in the State of Illinois upon the facts in this case is not different from the one in the United States Supreme Court and the one we seek here to maintain. But if I am mistaken in this, then my proposition is, that *the rule in the United States Supreme Court is the rule of this Court for the decision of this case*. This I now proceed to show.

IV.

But even if the rule in the Supreme Court of the State of Illinois upon the facts in the present case is not the same as the rule in the Supreme Court of the United States, then the Supreme Court of the United States follows its own rule notwithstanding the rule of the State Court to the contrary; and this Court must follow the rule of the United States Supreme Court.

The question in the present case is a question of general commercial law applicable to municipal bonds generally. It is a question of their validity in the hands of *bona fide* holders. It is not the question of the construction of a statute, or of a rule of property, in the State of Illinois, but a broad general question of the rights of a *bona fide* holder of municipal bonds and of the general rules of the common law applicable thereto. On such a question, if there be any difference between the views of the Supreme Court in which the question arises and of the Supreme Court of the United States, the latter Court will follow its own views, and will not be governed by the decisions of the Supreme Court of the State. This rule—that in such cases the United States Supreme Court will follow its own decisions—has been many times laid down, several times in Illinois cases. In the case of *Pana vs. Bowler*, 107 U. S., 529, this question was passed upon, and the Court declined to follow the rule of the Supreme Court of Illinois. The latter Court had decided in *Lippincott vs. Town of Pana*, 92 Illinois, 34, that certain bonds were void, notwithstanding they were in

the hands of *bona fide* holders. When this question came before the Supreme Court of the United States that Court refused to follow the decision of the Illinois Court. The Court, in its opinion (pp. 540, 541), said:

"It is insisted that this Court is bound to follow this decision of the Supreme Court of Illinois, and hold the bonds in question void. We do not so understand our duty. Where the construction of a State constitution or law has become settled by the decision of the State Courts, the Courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular and therefore void. *But we are not bound to accept the inference drawn by the Supreme Court of Illinois that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders.* This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any Court, however learned or able it may be. *Swift vs. Tyson*, 16 Pet., 1; *Russell vs. Southard*, 12 How., 139; *Watson vs. Tarpley*, 18 *Id.*, 517; *Butz vs. City of Muscatine*, 8 Wall., 575; *Boyce vs. Tabb*, 18 *Id.*, 546; *Oates vs. National Bank*, 100 U. S., 239; *Railroad Company vs. National Bank*, 102 *Id.*, 14. See also *Burgess vs. Seligman*, *ante*, p. 20, where the question, how far the Courts of the United States are bound by the decision of the State Courts, is carefully re-examined, and the rule on the subject stated with precision.

We cannot follow the decision of the Supreme Court of Illinois in *Lippincott vs. Town of Pana*, *ubi supra*, without overruling a uniform current of decisions of this Court, beginning with *Commissioners of Knox County vs. Aspinwall*, 21 How., 539, and continuing down to the present time. The rights of the *bona fide* holders of negotiable municipal bonds, as we have stated them in this opinion, are too firmly settled by the decisions of this Court to be shaken.

Our conclusion is, therefore, that the bonds in question in this case are valid in the hands of a *bona fide* holder, notwithstanding the irregularity in the conduct of the election by which they were claimed to be authorized."

In this opinion the Court referred to *Burgess vs. Seligman*, 107 U. S., 20, and say that in that case "the question how far the Courts of the United States are bound by the decisions of the State Courts is carefully re-examined and the rule on the subject stated with precision." In *Burgess vs. Seligman*, referred to, *supra*, this Court says (pp. 33–35):

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of of what the law is. But where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment; *as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or*

when there has been no decision of the State tribunals, the Federal Courts claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their own dignity as independant tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State Courts. *As, however, the very object of giving to the national Courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions.* The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail.

In the present case, as already observed, when the transaction in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal Court was to wait for the State Courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State Court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment, which it is our duty to apply to the case, we are forced to a different conclusion. *Pease vs. Peck*, 18 How., 595, and *Morgan vs. Curtenius*, 20 *Id.*, 1, in which the opinions of the Court were delivered by Mr. Justice GRIER, are precisely in point."

See also the long list of cases cited by the Court in the note, page 34.

The Court also refused to follow the rule of the Supreme Court of the State of Illinois in regard to certain bonds in *Marshall County vs. Cook*, 38 Illinois, 44, in which case bonds were held void. When the same question came before the Supreme Court of the United States in the case of *Supervisors vs. Schenck*, 5 Wall., 772, that Court expressly declined to follow the rulings of the State Court upon this question of general commercial law. The Court, in its opinion, says (p. 784):

"Attention is drawn to the fact that in a recent case, not yet reported, the Supreme Court of the State have held that these bonds are void even in the hands of an innocent holder, but inasmuch as the power to issue the bonds was fully conferred by law, the question of their validity in the hands of innocent holders, without notice, is a question of commercial law, where the State adjudications, although entitled to great respect, do not furnish the rule of decision in this Court."

See also cases cited under Point V., *infra*.

The Court below referred to *Harding vs. Railroad Co.*, 65 Ill., 90, as a decision contrary to the plaintiff's, notwithstanding plaintiff is the *bona fide* holder of the bonds and coupons, and as a decision, which in the present case, the United States courts must follow. This precise question as to whether the rule in *Harding vs. Railroad Co.* prevent such bonds as were issued without proper notice of election from being valid in the hands of *bona fide* holders, and whether, if so, the United States courts must follow such a rule, was passed upon in *County of Warren vs. Marcy*, 97 U. S., 96, where the very bonds, the issue of which was enjoined in *Harding vs. R. R. Co.*, were in the hands of *bona fide* holders before the United States Supreme Court; and that Court decided contrary to the Court below in the present case. That decision settles any

question of the application of *Harding vs. R. R. Co.*, 65 Ill., 90, to the present case (*supra*, Point III.).

Scotland County vs. Hill, 132 U. S., 107, and the case there cited (p. 112) illustrate the rule that the Supreme Court of the United States

"will not reconsider its former decision to the prejudice of *bona fide* holders of bonds issued prior to the change of decision in the State Court."

That is, where the State Court has once decided in favor of the validity of certain kinds of bonds, and afterwards changes its decisions and holds like bonds invalid, the United States Supreme Court will not follow the State Court, but will hold the bonds issued before the change in the decision, valid in the bonds of any *bona fide* holder in accordance with the general principles of law and with its own previous decisions.

The case of *Gelpcke vs. Dubuque*, 1 Wall., 175, goes further, and holds that if there was a settled rule of law in the State Courts prior to the issue of the bonds under which they were valid, then the United States Supreme Court will not only (1) not follow subsequent decisions of the State Court to the contrary (on this point like *Scotland vs. Hill*), but (2) will not even look into the matter to inquire if the prior rule of law in the State Court was correct, and will decide the case in accordance with such prior rule.

The case of *Rowan vs. Runnels*, 5 How., 134, *supra*, presents a still different state of facts (and either this case or *Scotland County vs. Hill* applies to the present case), namely, that where there is no settled rule of law in the State Courts at the time the right accrued (in the present case at the time when the bonds were issued), the United States Supreme

Court will not hold itself bound to follow a decision of the State Courts made *after* that time, but will itself examine the questions presented and determine them *de novo* in accordance with the general principles of law, and in doing so will follow its own prior decisions made in accordance with such principles of law.

In all these cases the one cardinal principle upon which the United States Supreme Court acts has been, *not to permit the rights and property of innocent persons to be unjustly affected by decisions of the State Courts made* AFTER *those rights and property came into existence*, but it will itself, in the exercise of the jurisdiction conferred upon it by the Constitution for this very purpose, inquire into and decide the questions as if they had come before it prior to such after-decisions by the State Court.

See especially the case of *Rowan vs. Runnels*, 5 How., 134, commented on at length, and the argument and other cases under Point V., *infra*.

If, therefore, the rule in the Supreme Court of the State of Illinois and the rule in the Supreme Court of the United States would differ upon the facts of the present case, the rule of the Supreme Court of the United States is the one which must be followed, as that Court has repeatedly decided.

V.

Even if it be held that the plaintiff would otherwise be bound to prove notice of the election, still the Court below erred in holding that the Curative Act of February 9th, 1869, did not apply, and that any alleged failure to give notice was not thereby cured.

Even if it be attempted to show that the Act of 1849 required that thirty days' notice of the election be given, and if it be further admitted that it was not proved that such notice was given, and that the plaintiff would otherwise be bound to make such proof, still the Act of February 9th, 1869, cured any alleged failure to give notice. The act is entitled, "An Act to amend an act entitled 'An Act to incorporate the Cairo and Vincennes Railroad Company,' approved March 6th, 1867, and for other purposes." The third section of the act relates to the point now under consideration. That part of the act which applies to the point now under consideration is Section 3, as follows:

"SEC. 3. Be it further enacted, that all contracts made by towns, cities and counties, into, through or near which the Cairo and Vincennes Railroad shall run, whereby, as an inducement for the construction of said railroad, such towns, cities and counties agreed, upon the completion of certain portions of said railroad, to sell to the said company, at a nominal price, the stock of said company for which said towns, cities or counties, by a vote of their electors, had theretofore subscribed, and agreed to issue bonds in payment thereof, thereby, in effect, agreeing to make a donation to said company of certain amounts of the bonds of such towns, cities or counties, as an inducement for the construction of said railroad, are hereby declared to be valid and binding upon such towns, cities and counties, and shall be carried into effect, in good faith, by the same; *and all orders for and notices of elections, and*

elections and returns of such elections, in respect to such subscriptions of stock to said company, in any such towns, cities and counties, are hereby declared to be valid and binding upon such towns, cities or counties."

This act, therefore, which expressly applies to the railroad in question, and which expressly purports to validate all elections, cured any alleged defect in failing to give thirty days' notice. There can be no question that at the time this act was passed, in 1869, the Legislature of Illinois had the power to pass such an act. The Act of 1849, which required the notice, was the Legislature's own act, and it certainly had the power to cure a defect in a failure to give notice which it had thus required to be given. The Constitution of 1870 had not in 1869, been adopted and the Legislature was not in any way prohibited or prevented from passing such a curative act.

The general rule of law on this point is stated in 1 Dillon on Municipal Corporations, Section 544, as follows:

"§ 544. RETROSPECTIVE STATUTES VALIDATING IRREGULAR SUBSCRIPTIONS AND BONDS.—In the absence of special constitutional restrictions, the competency of the Legislature to enact retrospective statutes, to validate an irregular or defective execution of a power by a municipal or public corporation, is undoubted. And the power to cure defective subscriptions to the stock of railway companies and to validate bonds issued therefor has been frequently exercised and judicially sustained. Subsequent legislative sanction within constitutional limits is equivalent to original authority."

See the authorities cited in the notes of this section.

This was an act upon which any *bona fide* purchaser of the bonds might rely as curing any alleged defect in failing to give notice. On the general principles of law this curative act was valid, *and at*

the time these bonds were issued there had been no decision by the Supreme Court of Illinois that this was anything other than valid. Further, the Supreme Court of the United States has expressly decided that this act was valid and cured any alleged defect in the election; and this rule of decision is binding upon this Court. The case is referred to at length *infra*. Inasmuch as the holders of these bonds acquired them at a time when they were entitled, upon the general principles of law, to rely upon the validity of this curative act, any decision by the Supreme Court of the State of Illinois afterwards made (as was *Gaddis vs. Richland County*, 92 Ill., 119, which was relied on by the Court below) will be disregarded by the Supreme Court of the United States in considering the act in question under the well-known rules of that Court, as stated in the case hereafter referred to at length.

It is well settled that the United States Courts, in suits arising therein by reason of the citizenship of the parties, *will not give to decisions of the State Courts any retroactive effect*, so as to deprive persons of property or rights which they acquired before such State decisions were rendered. We have already seen that in questions of general commercial law, such as are those in the present case, the United States Courts will not follow the decisions of the State Courts, as such, at all (*supra*, Point IV.). The proposition I now state is, that as a general fixed rule, and in other cases, as well as in those involving questions of commercial law, the United States Courts *will not give to the decisions of State Courts a retroactive effect*, and will not follow State decisions when such would be the result. This is an old rule of the United States Supreme Court, and it has been repeatedly applied. It was applied in a

case which presents an exact and striking parallel to the present one. It is urged here that this Court should follow *Gaddis vs. Richland County*, 92 Ill., 119, as to the Curative Act now in question so as to affect rights and property in bonds which were issued long before that decision was rendered, and should not follow *Jonesboro vs. Cairo, &c. R. R. Co.*, 110 U. S., 192, which is unquestionably correct and in accordance with the general principles of law.

A precisely similar question—namely, as to which decision the United States Courts should follow—arose in *Rowan vs. Runnels*, 5 How., 134. The Supreme Court of the United States had decided in *Groves vs. Slaughter*, 15 Pet., 449, upon the interpretation of a clause of the Constitution of Mississippi, which went into effect May 1, 1833, to the effect that it did not prohibit the purchase and sale of slaves, and the making of contracts therefor; and hence such contracts were not invalid. Subsequently, the Supreme Court of Mississippi decided that the Constitution did prohibit such contracts and render them invalid. In the Supreme Court of the United States it was argued (p. 337):

"That inasmuch as this Court adopts the construction given by the State Courts to their own Constitution and laws, we ought to follow the decisions in Mississippi and declare the contract before us to be void, notwithstanding the case of *Groves vs. Slaughter*."

But the Court refused to follow the decision of the Court of Mississippi, and, on the contrary, followed its own previous decision. The reason of the decision is well stated in the opinion of the Court (Chief Justice TANEY) as follows (p. 139):

"Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts and *from the*

time they are made will regard them as conclusive in all cases upon the construction of their own Constitution and laws. *But we ought not to give them a retroactive effect and allow them to render invalid contracts entered into with citizens of other States which, in the judgment of this Court, were lawfully made.* For, if such a rule were adopted and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the Courts of the United States, might become utterly useless and nugatory. We are of opinion, therefore, that the case of *Groves vs. Slaughter* must rule this case and, consequently, that the judgment of the Circuit Court must be reversed."

Now in the present case the issuing of the bonds, and the rights acquired by the holders thereof, took place long before the decision of *Gaddis vs. Richland County*, 92 Ill. 119 *supra*. This Court should, therefore, as was done in *Rowan vs. Runnels*, 5 How., 134, *supra*, follow the decision of the Supreme Court of the United States in Jonesboro vs. R. R. Co., 110 U. S., 192; and (as did the Supreme Court of the United States) reverse the judgment of the Circuit Court which followed the State Court decision.

In the leading and well-considered case of *Burgess vs. Seligman*, 107 U. S., 20 (in which the United States Supreme Court say, they state their views "*with distinctness*," and which the same Court refers to in *Pana vs. Bowler*, 107 U. S., 529, 540, 541, as stating "*the rule on the subject with precision*,") the Court say (p. 33):

"*So when contracts and transactions have been entered into and rights have accrued thereon* under a particular state of the decisions, *or where there has been no decision* of the state tribunals, the Federal Courts claim the right to adopt their own interpretation of the law applicable to the case," although a different interpretation may be adopted by the State Courts *after such rights have accrued*."

The Supreme Court thus again states and applies the same rule that was stated and applied in *Rowan vs. Runnels, supra.* There are numerous other cases of the Supreme Court of the United States to the same effect (see especially *Scotland County vs. Hill*, 132 U. S., 107; *Gelpcke vs. Dubuque*, 1 Wall., 175; and *Rowan vs. Runnels*, 5 How., 134, as they are commented on at length under Point IV., *supra*).

Having seen what effect should be given to these two cases, one by the Supreme Court of Illinois and the other by the United States Supreme Court, I proceed now to consider just what these decisions are.

In *Gaddis vs. Richland County*, 92 Ill., 119, *supra*, the Supreme Court of Illinois construed the following provision of the Constitution of Illinois:

"No county, city, town or township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipality prior to such adoption."

The Curative Act had been passed in 1869, prior to the adoption of the Constitution, July 2, 1870. The Supreme Court of Illinois held that the Curative Act did not apply, on the ground that the words "*under existing laws*" in the Constitution mean laws existing—not at the time of the adoption of the Constitution, or at any time previous—but *only at the time the vote is had*; so that a Curative Act passed subsequent to the

vote, and *prior to the adoption of the Constitution*, would have no effect. In short, the decision of the Illinois Supreme Court was that, though the Curative Act would have made the election valid but for the subsequent adoption of the Constitution, the Constitution rendered it invalid. Such construction would make the Constitution have a retroactive effect, which the proviso above quoted was expressly intended to prevent.

THE TRUE CONSTRUCTION and the one adopted by the United States Supreme Court in *Jonesboro vs. R. R. Co.*, 110 U. S., 192, is that if at the date of the adoption of the Constitution there was a "subscription authorized under existing laws by a vote of the people of such municipality *prior to such adoption*," then, whether the subscription had been authorized by one act or two acts, or by one act under which proceedings had been defectively executed and subsequently cured by another act "*prior to such adoption*" of the Constitution, then the subscription was valid. The Constitution speaks from the time it takes effect, and when it says "authorized under existing laws * * * *prior to such adoption*" it means *authorized at the time the Constitution takes effect:* and there can be no doubt that the subscription and issue of the bonds were then authorized. The words "authorized under existing laws" means no more than "authorized by law" or simply "authorized," for, if authorized at all, it is "by law" and "under existing laws." This construction does not make the Constitution retroactive, and it effects what the proviso above quoted was expressly intended to effect.

The Court below, therefore, erred in refusing to hold that the Curative Act of February 9, 1869, did not cure any alleged want of proof of notice of the election, even if it be rightly held that the plaintiff must furnish such proof.

VI.

For these reasons, therefore, the judgment of the Circuit Court should be reversed.

JOHN F. DILLON,
Of Counsel for Plaintiff in Error.

Jan. 2, '92—50.

FILED
MAY 11 1892
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

IN THE MATTER

OF

The Application of MARY E. POST, Administratrix of the Estate of A. T. Post, deceased, for a Writ of Certiorari under section 6 of the Act of Congress, approved March 3, 1891, creating the Circuit Court of Appeals.

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

JOHN F. DILLON,

Attorney for Petitioner.

C. G. Burgoyne, Cor. Walker and Centre Sts., New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

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OF

The Application of MARY E. POST, Administratrix of the estate of A. T. Post, deceased, for a Writ of Certiorari under Section 6 of the Act of Congress, approved March 3d, 1891, creating the Circuit Court of Appeals.

Brief in support of Application for Writ of Certiorari.

A certified copy of the record is submitted with this application for a writ of certiorari, from which the following facts appear.

The parties, by a stipulation in writing, waived a jury and tried the case before the Court (Record, p. 9). The Court made special findings of fact (Record, pp. 26–28), including those which I now proceed to state.

This action was brought to enforce the payment of certain coupons attached to bonds. The following is a copy of the bonds and coupons (Record, pp. 4–5, 12–13).

"UNITED STATES OF AMERICA.

"Number 172. Dollars $500.

"PULASKI COUNTY BOND.

"COUNTY OF PULASKI, STATE OF ILLINOIS.

"*Know all men by these presents:*

"That the County of Pulaski, in the State of Illinois, acknowledges itself indebted to the Cairo and Vincennes Railroad Company, or bearer, in the sum of five hundred dollars, which sum the said county promises to pay said company, or bearer, in the City of New York, twenty years after date, with interest thereon from and after November 1st, 1872, at the rate of eight per cent. per annum, payable half yearly on the first days of January and July of each year (except the last coupon, which is payable with this coupon), on the presentation and surrender, at the place in the said City of New York where the Treasurer of the State of Illinois pays the interest and debt of said State, of the coupons hereto attached. This bond is one of two hundred of like tenor and amount, of the same issue, and is issued pursuant to an order of the County Court of said county, authorized by a majority of the legal votes cast at an election held in said county pursuant to law, on the 5th day of November, A. D. 1867. This bond is also issued under the provisions of an "Act to incorporate the Cairo and Vincennes Railroad Company," approved March 6th, 1867, and under the provisions of an act to amend said act, approved February 9th, 1869; also under the provisions of an act entitled "An Act to find and provide for the payment of the railroad debts of Counties, townships, cities and towns," approved April 16th, 1869, and is in part payment of a subscription to the capital stock of the Cairo and Vincennes Railroad Company in the total sum of one hundred thousand dollars.

In testimony whereof the said County of Pulaski has executed this bond by the County Judge of said county, under the order of the County Court, signing his name hereto and by the Clerk of said Court under the order thereof, attesting the same and affixing hereto the seal of said Court.

This done at the office of the Clerk of said Court this seventeenth day of October, A. D. 1872.

GEORGE S. PIDGEON,
County Judge Pulaski County, State of Illinois.
Attest:
E. B. WATKINS,
{ SEAL } { COUNTY COURT } *Clerk of the County Court of Pulaski County, Illinois.*

The County of Pulaski will pay to bearer, at the place in the City of New York where the Treasurer of the State of Illinois pays interest on the State debt, the sum of twenty dollars on the first day of , 18 , being six months' interest on bond No. .

E. B. WATKINS,
County Clerk."

The provision of the "Act to incorporate the Cairo and Vincennes Railroad Company," approved March 6, 1867 (referred to in the bond, *supra*), which authorizes the issue of the bonds, is as follows:

"SECTION 10. The several towns or counties through or near which said railroad shall pass, may subscribe for and take stock in this company, and may issue bonds in payment of such stock of five hundred dollars each, bearing interest at the rate of eight (8) per cent. per annum, or less, payable half yearly, in the City of New York, on the first days of January and July of each year, and bonds to not run longer than twenty-five years, and a tax of not more than one dollar on each one hundred dollars' worth of taxable property, may be levied and collected in such town, city or county, per annum to pay the installments on such stock, or to pay the interest and principal of bonds issued in payment for such stock; provided, that no such subscription shall be made, no such bonds shall be issued, and no such tax shall be levied unless a majority of the legal voters of said town, city or county shall vote for the same at an election, to be held under order of the corporate authorities in cases of towns and cities, and of the county court in cases of counties.

Provided, further, that a majority of the legal voters at any such election shall be held as a majority of the

legal voters of any such town, city or county, and the questions of making a subscription, issuing bonds and levying taxes may be submitted as one question or as separate questions at such election, and either or all of said questions may be submitted to an election at any time, in the discretion of the authorities authorized to call such election."

2 Illinois Private Laws, 1867, p. 561.

The Constitution of Illinois (adopted July 2, 1870), provides as follows (Sec. 12, Art. 9):

"No county, city, town or township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation or make donation to or loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the rights of any such municipality to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipality prior to such adoption."

The subscription of Pulaski County to the stock of the Cairo and Vincennes Railroad Company, and the issue of bonds to pay therefor, were "authorized under existing laws by a vote of the people of such municipality (county) prior to such adoption" (of this article of the Constitution, July 2, 1870), to wit, on November 5, 1867. This is shown by the records of Pulaski County, offered in evidence (Record, pp. 13-14), which were found to be true by the trial Court (Record, p. 27).

The plaintiff is a *bona fide* holder for value of the bonds and coupons (Record, p, 27, First Finding).

We have here, then, a county bond, expressly

authorized by statute (Statute, *supra*); not issued in conflict with the Constitution of the State (Constitution and vote, *supra*); executed by the duly constituted county authorities, to wit, the County Court; and containing recitals by such County Court that the bond is issued under said statute in part payment of the subscription which the statute expressly authorizes, and that it is issued pursuant to an order of the County Court, authorized by a majority of the votes cast at an election held in said county, pursuant to law, on the 5th day of November, 1867 (before the adoption of the Constitution of July 2, 1870).

I submit with perfect confidence that, within the repeated decisions of this Court, this is a valid bond in the hands of a *bona fide* holder. Test the matter: Look at the face of the bond, the statute authorizing its issue and the Constitution of the State—the bond complies strictly and completely with the law. Further, the vote of the people, as the Court below found, was actually had, as recited in the bond, prior to the adoption of the Constitution. The Constitution was therefore complied with. The County Court—which, within the repeated rulings of this Court, is "the duly constituted tribunal" to determine such matters, and the decision of which, recited in the bond, is final and conclusive in favor of a *bona fide* holder—has determined, and so recited in the bond, that all the provisions of the statute have been complied with. That is all there is in this case. I will not refer to your decisions which establish these propositions; they are familiar law.

Notwithstanding, however, the repeated decisions of

this Court affirming the validity of bonds such as those now in question, the Circuit Court in the present case refused to follow them, and held (Opinion, Record, p. 34) that "it devolved upon the plaintiff (a *bona fide* holder of the bonds and coupons) to prove on the trial that notice of the election under which the subscription was made had been duly given," and on this ground the Court rendered judgment for the defendant. The Circuit Court thus held, notwithstanding the recitals in the bonds that the election was held "pursuant to law," and notwithstanding the plaintiff is a *bona fide* holder of the bond.

The plaintiff then took the case on writ of error to the United States Circuit Court of Appeals for the Seventh Circuit. The briefs and arguments in the Circuit Court of Appeals were directed to this point, upon which, and upon which alone, the trial Court decided the case, namely, whether the plaintiff, a *bona fide* holder of the bonds, must prove notice of the election. The authorities and arguments bearing on this point are fully stated, so far as is necessary, in the brief which I submitted to the Court of Appeals on the hearing of the case in that Court, copy of which is attached to this brief. I respectfully refer this Court to that brief as showing conclusively, by the repeated decisions of this Court, that the plaintiff, as the *bona fide* holder of the bonds and coupons in question, was not bound to prove that notice of the election had been given, but that the recital in the bonds made by the County Court, which was the duly constituted tribunal to determine this and other questions as to the issue of the bonds, was sufficient and conclusive.

The Court of Appeals, however, while it affirmed the judgment of the Circuit Court, did so on an entirely new and distinct ground, which we proceed now briefly to consider. This ground was, that the issue of the bonds was really a "donation," while the vote of the people authorized the issue of the bonds by way of a "subscription" to the capital stock of the railroad company. This decision, also, upon this new ground, was given notwithstanding the bonds on their face recite that they are issued in payment of a *subscription* to the stock of the railroad company, and this recital is made by the duly constituted county tribunal which by law, after the vote of the authorizing the subscription, had the whole charge of the issue and disposition of the bonds; and this decision was made notwithstanding the plaintiff was the *bona fide* holder of the bonds, and, as such, within repeated decisions of this Court, was entitled to rely upon such a recital made by such duly constituted tribunal.

There are certain things, it is true, of which even a *bona fide* holder is bound to take notice. Thus, for example, as was held in *Doon Township vs. Cummins*, 142 U. S., 366; *Lake County vs. Graham*, 130 U. S., 674; and *Dixon County vs. Field*, 111 U. S., 83, where the Constitution prescribes a debt limit which is a certain percentage of debt to *assessed valuation*, even the *bona fide* purchaser is bound to take notice of the assessed valuation, as determined from the proper *assessor's records*. The reason is, as stated by this Court in *Dixon County vs. Field*, 111 U. S., 89, 93, and restated in the other two cases:

"If the fact necessary to the existence of the authority was by law to be ascertained, *not officially by the*

officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that *the authority to act at all depended upon the actual objective existence of the requisite fact*, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument."

And as is also stated in the same opinion: "*Nothing in the way of inquiry, ascertainment or determination as to* THAT FACT *is submitted to the county officers.*" In other words, where the Constitution says that the debt must not exceed a certain percentage of the assessed valuation, every one—a *bona fide* holder of bonds as well as any other person—is obliged to take notice of what the assessed valuation is; this is not a matter upon which the county officers, in issuing the bonds, have power to make any determination whatever. It is not a matter committed to them.

But the present case is wholly different. After the vote authorizing the subscription to the capital stock of the railroad company, the matter of carrying out this vote and making the subscription and issuing the bonds *was a matter committed to the County Court*, and its determination, recited in the bond, as to whether it was making a subscription or a donation, is in favor of a *bona fide* holder of the bond final and conclusive upon this point, and any such holder of the bonds is entitled to rely upon such recital as a determination by the duly constituted tribunal of a question committed by law to it. This view is in

perfect harmony with all the decided cases of this Court, even those which go to an extreme in not holding recitals conclusive in certain cases, about which the members of this court have had different views.*

THE VERY QUESTION PRESENTED IN THE RECORD NOW BEFORE THIS COURT has, in fact, been passed upon by this Court in the case of *Anderson County vs. Beal*, 113 U. S., 227, a case which, on this point, is on all fours with the present case. In that case the county voted to subscribe $200,000 to the capital stock of a railroad company, and to issue bonds in payment thereof. When the county officers came to issue these bonds and make the subscription to the stock, in the very ordinance which made the subscription to the stock and authorized the issue of the bonds (Report, p. 232), they voted to sell the $200,000 in stock to the railroad company in consideration of one dollar. In fact, it does not appear that any certificate of stock was ever

*In the latest case decided by this Court involving the construction and effect of a constitutional limitation upon the power to issue bonds (Chaffee County vs. Potter, 142 U. S., 355), the effect of recitals is carefully considered. Giving the opinion of the Court, LAMAR, J., says:

"Of course the purchaser of the bonds in open market was bound to take notice of the constitutional limitations of the county with respect to the indebtedness which it might incur. But when, upon the face of the bonds, there was an express recital that that limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further.

"The test is, what does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it with respect to constitutional limitation was false, the county would not be bound by that recital, and would not be estopped from questioning the invalidity of the bonds in this particular.

"The recital in the bonds that such determination has been made, and that the constitutional limitation has been exceeded in the issuance of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law estops the county from saying that it is untrue."

issued by the railroad company to the county in that case. It was objected in this Court that the county officers had no authority thus to give away the stock, and practically make a donation of the bonds. This Court, however, held that the disposition of the stock was a matter with which the *bona fide* holder of the bonds had no concern. This Court said (BRADLEY, J., p. 240):

"When the bonds were delivered to the company, the transaction was complete and the bonds, as they afterwards passed to *bona fide* holders, passed free from any impairment by reason of any dealing by the board with the stock subscribed for, to which the county became entitled by the issuing and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a *bona fide* holder of the bonds or coupons."

The above case is conclusive upon the point in question.

A similar question was presented in the case of *Bernards Township vs. Morrison*, 133 U. S., 523, in which this Court said (p. 526):

"It is conceded that the Commissioners were duly appointed; that the issue of bonds was not in excess of the amount authorized by the statute; that a paper purporting to contain the consent of the requisite number of taxpayers, duly verified by the affidavit of the township assessor, was filed in the office of the Clerk of the county; and that the plaintiffs were *bona fide* holders. But the contention is that the consent roll did not in fact contain the requisite number of taxpayers, and that the affidavit of the assessor was not true; *also that the Commissioners did not borrow any money on the bonds, but disposed of them without lawful consideration.*

The Circuit Court held that these defenses were unavailing against *bona fide* holders of the bonds; and with that ruling we concur. Indeed, all the questions which were earnestly presented and argued by counsel

for plaintiffs in error have been often considered and decided by this Court."

I might add to these decisions many others of this Court, but it is not necessary. The precise point which I maintain is, that after the vote of the people authorizing the subscription to the capital stock the whole matter of making the subscription and issuing the bonds was committed by law to the County Court; and that bonds duly executed by the county, reciting the statute, the vote of the people authorizing the subscription and that the bonds were issued in accordance therewith, is a final and conclusive determination of these facts as respects a *bona fide* holder—a *final* determination of questions which were *within the jurisdiction* of the County Court, as repeatedly decided by this Court.

I have not considered the question whether in the present case, as a matter of fact, the County Court issued the bonds to pay for a subscription to stock or as a donation to the railroad company, for, under the decisions of this Court, as above shown, the recitals in the bonds made by the County Court are conclusive in favor of a *bona fide* holder. But if it were necessary to go into this question it could, I submit, readily be demonstrated that the County Court had authority to do just what it did do in reference to the stock and bonds. The County Court, after subscribing for the $100,000 of stock, and receiving a certificate of the railroad company therefor, and issuing $100,000 to the railroad company to pay for such stock, would then have had $100,000 of the stock. This stock was, no doubt, as is usually the case under our American method of paying for the construction of railroads,

wholly or largely water; in other words, was really worth almost nothing, perhaps worth a little as giving to its holder a voice in the election of officers to manage the road, but at all events had only a small market value. This is the more evident when we consider that the real and avowed purpose of the issue of the county bonds was to give substantial aid in the construction of the railroad. Under these circumstances it would have been competent for the County Court, having the charge and administration of the county affairs and property, to sell the stock for its fair market value. The county bonds which it had issued were presumably worth par. It would therefore, no doubt, have been a perfectly fair and legitimate transaction for the County Court, under these circumstances, to sell the $100,000 of railroad stock, really worth almost nothing, for $5,000 of its own bonds, worth par or thereabouts; at all events no one could ascertain from the county records that this would not have been a perfectly fair transaction. This would no doubt have been giving full market value for the stock.

Now, what the County Court did, as shown by its records introduced in evidence (Record, p. 15–16, 19), was to agree to sell its $100,000 stock to the railroad company for $5,000 of the county bonds; but instead of going through with the useless formality of issuing the certificate for the stock and of issuing the $5,000 bonds, and then returning them to each other respectively, the parties agreed, the one to waive the issue and delivery of the certificate of stock, and the other to waive the issue and delivery of the $5,000 of bonds. It would be going a great ways to hold that it was not competent for the parties thus to

do. However that may be, the proposition, both upon principle and upon the decisions of this Court, is undoubted that a *bona fide* of such a bond issued by the County Court which recites that it is issued in part payment for a subscription to the stock is entitled to rely upon such recital.

But the Court of Appeals decided the case upon the ground above stated, which is contrary to the principles of general conmercial law, and contrary to the repeated decisions of this Court. As already stated, the decision of the Circuit Court and the argument in the Court of Appeals were directed to the point whether plaintiff, a *bona fide* holder of the bonds, was bound, in the first instance, to prove that notice of the election was duly given. This was the only objection then raised against the validity of the bonds. After the oral argument in the Court of Appeals and the submission of briefs, the Supreme Court of Illinois decided the case of *Choisser vs. People*, 29 Northwestern Reporter, 546 (January 18, 1892), in which the Illinois Court, *as between the original parties to the bonds*, held that where Saline County voted a subscription to capital stock of the Cairo and Vincennes Railroad Company, and the County Court made a subscription of $100,000 to the stock, payable in $100,000 of the bonds, and then in the same ordinance agreed that the stock should be sold to the company for $5,000 in said Saline County bonds, and only $95,000 bonds were ever issued—that in such case the bonds were really a donation and not a subscription, and that the bonds were void *in the hands of the original parties.* The suit was a tax collector's suit to collect taxes to pay interest

on the bonds. The Court, in said case of *Choisser vs. The People*, *supra*, say (p. 549):

"There is no evidence in the record before us that the bonds issued by the County of Saline to the Cairo & Vincennes R. R. Co., or any of them, have been negotiated by said railroad company, or that there are any assignees of said bonds, who occupy the position or are entitled to the rights of *bona fide* holders thereof for value."

That case, therefore, clearly was not in point; yet the Court of Appeals decided this case upon its authority, without considering the decisions of this Court and its duty to follow them. But whatever may be thought of that case, it was clearly the duty of the United States Courts, including the Circuit Court of Appeals, to follow the decisions of this Court, and not those of the State Court, for two reasons: (1) This is a case involving a question of general commercial law, in which the United States Courts exercise their own judgment (see my brief in Court of Appeals, p. 32, filed herewith); and (2), so far as the Illinois case construed the Constittuion or statutes of Illinois, it was made *after* the bonds here in question were issued and rights had accrued thereunder (see my brief in Court of Appeals, p. 41).

As to any point that the Constitution of Illinois of July 2, 1870, does not authorize a "*donation*" of bonds to a railroad company, in case of a vote previously authorizing the same, it is settled by the decisions of the Supreme Court of Illinois and of this Court that the word "subscription" in the proviso to Section 12, Art. 9, of the Constitution, quoted *supra*, includes a "donation." The Constitution, therefore, did not forbid the

issue of these bonds, even for a donation, provided a vote was had.

Fairfield vs. County of Gallatin, 100 U. S., 47.
Enfield vs. Jordan, 119 U. S., 680, 691.
R. R. Co. vs. Pinckney, 74 Ill., 277.

Even if we concede (what the Court of Appeals assumed to be a fact), that the records of the County Court of Pulaski County show that the bonds were issued as a "donation" to the Railroad company and not as a "subscription" to its stock, then we have this state of facts: the County Court has made *two contradictory records*. One record is the bonds themselves, which it has issued in the most solemn manner, under its seal, signed by its Judge and countersigned by its Clerk, in which record, in carefully chosen language, it sets forth that the bonds are issued in payment of a "*subscription*" to the capital stock of the railroad company. This is the record which the County Court sends forth to the world and the one which it holds out to investors. The very design and object which the County Court had in making this record was to assure investors who read the bonds that the facts therein stated were true. This is the County's "*Prospectus.*" How courts deal with prospectuses is well known. Some examples are given in the extracts in the note.*

* In *Smith vs. Chadwick*, L. R., 9 Ap. Cas., 187, 201, a common-law action for deceit by statements in a prospectus, Lord BLACKBURN says:

"If with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that

But the County Court in effect now says :

" True, we made that record, and we recited in the bonds that they were issued as a subscription, and we sent that record out to the world, and we designed and intended that investors should rely upon that record ; but we also made another record, which we did not send out, by which it appears that what we stated in the bonds was not true ; by this other record it appears that the bonds were not issued as a *subscription*, but as a *donation*. This other record is on our books, and might have been seen if the investor had chosen to look. We sent out one record to the investor ; we did not send out the other. He relied

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meaning on it is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense, it may be that they lie *like* truth ; but I think they lie, and it is a fraud. Indeed, as a question of casuistry, I am inclined to think the fraud is aggravated by a shabby attempt to get the benefit of a fraud without incurring the responsibility."

Lord Chancellor CHELMSFORD says :

" The alleged representations are contained in a prospectus, the object of which was to invite the public generally to join the proposed undertaking. In an advertisement of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent man will accept the prospects which are always held out by the originators of every new scheme without considerable abatement.

" But although, in its introduction to the public, some high coloring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking may be expected, *yet no misstatement or concealment of any material facts or circumstances ought to be permitted*. In my opinion, the public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candor and honesty ought to characterize their published statements. As was said by Vice-Chancellor KINDERSLEY, in the case of the New Brunswick and Canada Railway Company vs. Muggeridge (1), ' those who issue a prospectus holding out to

on the statements in the record which we sent to him; but he had no right to rely on such statements; he should have looked at our other record, which we did not send him, and which contradicted the statements in the record which we did send to him."

If there was ever a case for an estoppel in order to prevent a cheat and a fraud, this is such a case. The county makes to the investor its solemn representations in its bonds that they are issued for a *subscription; now* the county seeks to evade the just payment of these bonds on the ground that the same county

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the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.'"

2 Eng. and Irish Appeal cases, Vol. 2 (1867), page 113. (Directors, &c., of Central Railway Co. of Venezuela vs. Kisch).

The Court of Appeals of this State, citing the above case with approval, say:

"It is hardly necessary to say that a director of the company who knowingly issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts, the natural tendency of which is to mislead and deceive the community and to induce the public to purchase its stock, is responsible to those who are injured thereby. Mere exaggerated statements of the prospects of a new enterprise will not subject those who make them to liability; but, as was said by the Chancellor in *Central Railroad Company vs. Kisch*, 'no material misstatement or concealment of any material fact ought to be permitted.' The directors of a company are supposed to know the facts touching its condition and property, and their statements in respect to its affairs naturally attract public confidence. If they fraudulently unite in an attempt to deceive the public, and by false statements of facts to give credit and currency to its stock, it is but simple justice that they shall answer to those who have been deluded into giving confidence to them."

Morgan vs. Skiddy, 62 N. Y., 319.

officials, to wit, the County Court, in their records, which they did not send out to the investor, state that the bonds are issued as a *donation*. A clearer case for an estoppel could not exist. If there are two contradictory records, then it is clear which one was intended for the investor; and the county, having made the representation to him that the bonds were issued as a subscription, cannot now insist that by the other record it appears the bonds were issued as a donation.

I need not go at length into an argument to show why the Constitution and Statutes of the United States give United States Courts jurisdiction of controversies between citizens of different States. This Court has stated its views of this subject in various decisions. In the well-known case of *Burgess vs. Seligman*, 107 U. S., 20, for example, this Court says (p. 34):

"*The very object* of giving the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views."

And it also immediately added: "It would be a dereliction of duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

If there was ever a case in which local prejudice may be presumed to exist, it is the present one, where a judgment in favor of plaintiff will declare a liability upon a part of the community, while a judgment in favor of defendant will exonerate the community. The duty of the United States Courts in such a case is clear, to follow the decisions of this Court. The Circuit Court of Appeals did not do so.

Of the importance of this case I need not argue at length. It involves the validity not only of plaintiff's bonds, but of others of the same issue; it involves the question of the establishment of a general principle of commercial law at variance with repeated decisions of this Court. The recognition of the doctrine of the Court of Appeals in this case means the casting upon *bona fide* holders of municipal bonds generally the burden of proving the performance of all conditions precedent to their issue. Under this new doctrine, every time a bond is bought and sold, the purchaser must, at his peril, not only look at the bond and the Constitution and statute law, must look at all the proceedings down to the execution and sale of the bonds, and must even look to the disposition of the proceeds. I need not add that such a doctrine, once established, destroys the negotiability of municipal bonds. The decision of the Circuit Court of Appeals is revolutionary and has justly filled the holders of such securities with alarm.

For these reasons a writ of *certiorari* should be issued, as prayed in the petition.

JOHN F. DILLON,
Of Counsel for the Petitioner.

No. 1559.

FILED
MAY 4 1892
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

In the Matter of the Application of Mary E. Post, Administratrix of the Estate of A. T. Post, deceased, for a Writ of Certiorari to the Circuit Court of Appeals, 7th District.

BRIEF AND ARGUMENT RESISTING THE APPLICATION FOR SAID WRIT OF CERTIORARI.

LEWIS M. BRADLEY,
Attorney for Defendant,
The County of Pulaski.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

No. 1559.

In the matter of the application of Mary E. Post, Administratrix of the Estate of A. T. Post, deceased, for a writ of *Certiorari* to the Circuit Court of Appeals, 7th District.

Brief and Argument Resisting Application for Certiorari.

This action having resulted in a judgment in favor of the defendant, the county of Pulaski, in Illinois, in the circuit court, the applicant, being plaintiff in the original suit began in 1889 in the southern district of Illinois, prosecuted a writ of error to the circuit court of appeals, again meeting with a judgment against her, now applies to this Court for the old but extraordinary writ of *certiorari*, and as grounds therefor presents her petition, alleging said last-mentioned judgment is final. No other cause appearing in her petition for such writ.

This Court having defined its position on the granting of this writ in applications of this character, I apprehend it will take a very strong showing to obtain it in any case, and more especially where it is only a question of dollars

and cents growing out of purely local laws in the various States of this Union. The class of bonds that applicant holds that this writ is asked for, in order for review in this Court of the judgment, vary in the facts in almost every case, rarely two of them being entirely alike. If this Court is to call for the record in this class of cases it will find the most persistent class of suitors it will have in the holders of municipal aid bonds.

Therefore, the question naturally arising in this application in any attorney's mind is to what extent this Court is going to examine into the merits of this cause, and the findings of the circuit court and circuit court of appeals. I will assume that no question of *gravity* or great *importance* appear on the record in this cause, and from an examination of matters considered *weighty* and *serious*, I fail to come to the conclusion that this cause belongs to that class as contemplated in this Court's holding.

Therefore, I cannot but believe this Court would deny this applicant the writ of *certiorari* under the holdings in *Lau Ow Bew* (141 U. S. 583), and application in the matter of Woods and Lovejoy (decided Feb. 29, 1892, and in March number advance sheets U. S. Supreme Court).

In Lau Ow Bew, *supra*, this Court said: "This branch of "our jurisdiction should be exercised sparingly and with "great caution." And in granting the writ in that cause this Court doubted the jurisdiction of the circuit court of appeals, but granted the writ on account of the *international grave* and *important* questions involved. While on questions of local laws in the Woods and Lovejoy application it was denied.

It appears from counsel's brief for applicant that some holders of this class of municipal bonds are frightened, and this is presumably the grave and important question involved, or that a new line of decisions has been promul-

gated compelling a new rule of action as to the holders of such bonds.

We do not think this is the question involved in the granting or refusing of this writ. Whether the circuit court or the circuit court of appeals erred or not, but what question of gravity and importance or what controversy arises involving weighty and serious matters in this cause? It is a cause with a citizen of our own country in controversy with a municipal corporation of another State other than where she resides over whether the municipality shall pay to applicant certain monies or not. It is one of the most common suits arising in the U. S. courts, and involves in my judgment only ordinary rules of law and no serious, grave, or weighty matters.

But since the counsel for applicant has arraigned the circuit court and circuit court of appeals in this cause for the findings made, I take the liberty to give the views I entertain of their decisions and some of the authorities supporting said courts.

The Circuit Court's Opinion.

The following proposition was conceded in the circuit court on the trial of this cause: That the alleged subscription having been made and the bonds from which the coupons were detached having been issued since July 2, 1870, when the second separate article of the constitution of Illinois was adopted, the burden of proof was on the plaintiff to show that the county authorities of Pulaski county had the authority to make the subscription and issue the bonds, and that the bonds were legally issued. In other words, the holder of the bonds must bring himself within the saving clause of the section, said section reading as follows:

"SEPARATE SECTION TWO, CONSTITUTION OF ILLINOIS, 1870,
"ADOPTED JULY 2, 1870.

" No county, city, town, township, or other municipality " shall ever become subscriber to the capital stock of any " railroad or private corporation, or make donation to, or " loan its credit in aid of, such corporation: *Provided*, " *however*, That the adoption of this article shall not be " construed as affecting the right of any such municipality " to make such subscription where the same have been " authorized under existing laws by a vote of the people " of such municipality prior to such adoption."

The following cases decide above proposition:

Jackson County *v.* Brush, 77 Ill. 59.
Middleport *v.* Ætna Ins. Co., 82 Ill. 562.
Wright *v.* Bishop, 88 Ill. 302.
Williams *v.* Town of Roberts, 88 Ill. 11.
The People, *ex rel. v.* Jackson County, 92 Ill. 441.
Town of Prairie *v.* Lloyd, 97 Ill. 179.
The People, &c., *v.* Town of Bishop, 111 Ill. 124.
Eddy *v.* The People, *ex rel.*, 127 Ill. 428.
Williams *v.* The People, *ex rel.*, 132 Ill. 574.
Choisser *v.* The People, *ex rel.* Rude, N. E. Rep. Vol. 29, p. 546.

There has been no holding of this Court contrary to the above proposition on bonds where the subscription was made and the bonds issued since the adoption of said section of the constitution 1870.

In Oregon *v.* Jennings (119 U. S. 74), cited as authority upon this question, the Court had under consideration sec. 12 of art. 9 of the Illinois constitution, which does not appear to have a proviso like that in question. So the case is not one in point as to the second separate section.

The well-understood rule respecting the construction of laws, organic and statutory, that where one seeks the ben-

efit of a saving clause the burden rests upon him to bring himself within such saving clause, was applied by the circuit court in this cause.

And the circuit court in applying the rule as to the indispensable proof of a valid election held that to have a valid election in Illinois it was necessary to have given notice thereof, citing Harding *v.* Railroad Co. (65 Ill. 97) as declaratory of this rule, yet the same rule had been laid down by the same court as far back as the 25 Ill. and again in the 38 Ill., and no conflict of authority exists between the U. S. Supreme Court and the Illinois supreme court as to the necessity of a notice in Illinois to make it a valid election in voting aid to railroads in that State.

In fact, the general laws of 1849 (see Second Session Laws of 1849, p. 28) required thirty days' notice to be given of all such elections as the one in question, and the charter of the Cairo & Vincennes Railroad Company under the tenth section of which this pretended election was claimed to have been held being silent on the question of notice, the circuit court held that said session laws of 1849 applied, and in this the circuit court was sustained by the supreme court of Illinois in Williams *v.* The People, *supra*, and Choisser *v.* The People, *ex rel.* Rude, *supra;* Harding *v.* Railroad Co. (65 Ill. 97).

And plaintiff's counsel conceded that the burden of proof was upon her to establish her right under the proviso to recover, and her counsel proceeded to introduce in evidence all the proofs plaintiff had of her right of recovery, including all the orders of the county court of Pulaski county relating to the bonds in question. And then because they failed to show her right to recover they complain of their own evidence or the want of it.

The circuit court certainly allowed plaintiff's counsel to

introduce all the evidence offered to establish plaintiff's right to recover, and on finding material and indispensable proof wanting the Court decided the issue for defendant.

The bonds recite an election held pursuant to the law, but do not say what law. If held under the tenth section of the charter of the Cairo & Vincennes Railroad Company, then no notice was given, because none is spoken of in it, and the order calling the election being silent on the question of notice, and all the records of the county court equally so, it is a strong presumption none was given.

Choisser *v.* The People, *ex rel.* Rude, *supra.*

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The circuit court of appeals in its decision of this cause nowhere intimates that on the point the circuit court decided this cause (had it been considered by the former court) would the decision have been different thereon. Such assumption by counsel I feel is not warranted by anything appearing in the opinion of the appellate court.

The circuit court of appeals considered this cause on a want of power in the county to issue the bonds in question as a donation, there being no general or special law in force at the time this alleged election was held, or at any time thereafter, enabling any municipality to aid by donation the Cairo & Vincennes Railroad Company. One of the recitals in the bonds in question being that "this bond is issued pursuant to an order of the county court of said county," &c. * * *

The portion of the county court proceedings relating to the ordering of the bonds to issue will be found on page 18 of record, and reads as follows: "Now, therefore, it is hereby "ordered that the bonds of said county, as aforesaid, be

" duly prepared, and that the county judge and the county " clerk be, and they are hereby, authorized and directed " to execute the bonds of said county in the sum of " $95,000, in sums of five hundred dollars each, in the usual " form, and to deliver the same to A. B. Safford, cashier " of the City National Bank of Cairo, in trust, and to be " delivered upon the condition hereinbefore mentioned, " and it is further agreed that, upon the completion of said " road and the delivery of said bonds upon the terms and " conditions hereinbefore expressed, this county will accept " and receive the balance of said sum of one hundred " thousand dollars, to wit, $5,000, due to said company in " full payment for the sum of one hundred thousand dol- " lars stock in said road, *and will waive the actual issue* " *thereof to said county.*"

Certainly no other order of the county court could have been referred to in the bonds in question, for no other proceeding of the county court of Pulaski county appears in the record to have ordered the bonds to issue. Therefore plaintiff being referred to the order of the county court which ordered these bonds to issue as a *donation out and out, the issuing of the stock to the county being waived* therein, and her counsel having introduced the order, given above, as a part of her case, she is certainly bound by the record.

She had notice of it from her bonds, introduced it in evidence, and cannot complain of its contents.

The circuit court of appeals gives in the opinion (record, page 37) the only section of the charter of the Cairo & Vincennes Railroad Company relating to the question of aid to the Company. On inspecting same this Court will see that power to subscribe to the capital stock of said Company only is given, and no power given to donate any bonds by any municipality is given, and if an election was held as

asserted, it could be only to subscribe to the capital stock of said Railroad Company.

The said court found that the power to donate did not exist in this municipality, and that there was a clear distinction between a subscription to the capital stock of a railroad company and a donation thereto.

That court is sustained in such distinction by the U. S. Supreme Court and the supreme court of Illinois.

Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625.

Choisser *v.* The People, *ex rel.* Rude, *supra.*

Schaeffer *v.* Bonham, 95 Ill. 368.

McCompin County *v.* The People, 58 Ill. 191.

It must be apparent to any lawyer that such distinction exists and is vital, and that it goes to the power and not to the mere defective execution of a power given.

The circuit court of appeals also held with the holding of the supreme court of Illinois that the subsequent amendment to the charter of the Cairo & Vincennes Railroad Company (see record in opinion, page 40), declaring by the legislature "That all contracts made by "towns, cities, and counties into, through, or near which "the Cairo & Vincennes Railroad shall run, whereby, as "an inducement for the construction of said railroad, such "towns, cities, and counties, by a vote of their electors, "had theretofore subscribed and agreed to issue bonds in "payment therefor, thereby, in effect, agreeing to make a "donation to said Company of certain amounts of the "bonds of such towns, cities, and counties as an induce-"ment for the construction of said railroad, are hereby "declared to be valid and binding upon such towns, cities, "and counties, and shall be carried into effect in good "faith by the same, and all orders for, and notices of elec-

" tions, and elections, returns of such elections in re-
" spect to such subscription of stock to said Company in
" any such towns, cities, and counties, and hereby de-
" clared to be valid and binding upon such towns, cities,
" and counties," that this was an attempt to impose upon the county an obligation in aid of the railroad without its own consent expressed in any legal form.

Choisser *v.* The People, *ex rel.* Rude, *supra.*

That this act was of such a character and unconstitutional and void we further cite the following cases:

Harwood *v.* Drainage Company, 51 Ill. 130.
The People *v.* Mayor of Chicago, *Id.* 218.
Hessler *v.* Drainage Commissioners, 53 Ill. 110.
Livingston *v.* Wider, *Id.* 302.
Marshall *v.* Siliman, 61 Ill. 218.
Wily *v.* Siliman, 62 Ill. 170.
Gaddis *v.* Richland County, 92 Ill. 127.
Williams *v.* Town of Roberts, 68 Ill. 11.
The People, *ex rel. v.* Jackson County, *supra.*
Williams *v.* The People, *ex rel.*, 132 Ill. 574.

The circuit court of appeals could, it seems, hold but one way on an act that declared on its face that a *donation* should be made by the municipality that had voted for a subscription.

The act unlike the one passed on by this Court in Jonesboro City *v.* Cairo, &c., Railroad Company (110 U. S. 192) left no discretion in the municipality, but declared the so-called contracts binding, and that the same should be *carried into effect in good faith*, thus attempting by legislation to compel the municipalities to donate their bonds to this Company in violation of the vote to subscribe to the capital stock of said Company, and in violation of the laws under which such alleged elections were held.

The deeper this subject is gone into the more convinced I become that the eminent and worthy jurist who wrote the opinion promulgated by the Court, that has been complained of by the counsel for applicant, knew the law and properly applied it in this cause, and that no good reason appears for awarding the writ applied for in this cause.

RECITALS IN BONDS.

We lay it down as a proposition now agreed to we believe by all the courts that recitals in municipal bonds cannot create powers. And that there is no inherent power in municipal corporations to aid in the construction of railroads, either by subscribing to the capital stock of railroad companies or by making donations to such companies of money or bonds, but such powers can only be given by express legislative provision.

Town of Concord *v.* Portsmouth Savings Bank, *supra.*
Rich *v.* Metz Township, 134 U. S. 632.
Board *v.* Farwell, 25 Ill. 181.
Clark *v.* Hancock, 27 Ill. 305.
Marshall County *v.* Cook, 38 Ill. 44.
Harding *v.* Railroad Co., 65 Ill. 90.
McWhorten *v.* The People, *Id.* 290.
Town of Big Grove *v.* Wells, *Id.* 263.
Lippencot *v.* Pana, 92 Ill. 24.
Pitzman *v.* Freeburg, *Id.* 111.
People *v.* Jackson County, *supra.*
Hewitt *v.* Normal School Dist., 94 Ill. 528.
Schaeffer *v.* Bonham, *supra.*
Choisser *v.* The People, *ex rel.*, *supra.*

The authority, when conferred, must be strictly pursued.

Harding *v.* Railroad Company, *supra.*
Rich *v.* Metz Township, *supra.*

Recitals must be of matters of fact and not matters of law.

Dixon County *v.* Field, 111 U. S. 83.
Katzenberger *v.* Aberdeen, 121 U. S. 172.
Crow *v.* Oxford Township, 119 U. S. 215.

The bonds in question do not declare that the provisions of law recited in them have been complied with, nor does it appear from an inspection of the record that the county authorities ever found that to have been the fact.

The case of Anderson County *v.* Beal (113 U. S., 227), cited as authority in this case by counsel for applicant, show that the bonds were delivered as a subscription and the authorities sold the stock back at a nominal sum, and is not an authority in point.

Nor are any of the cases where a recital within the power of the authorities to make and the attempt to dispute same, in point, and in fact all of the cases cited by counsel for applicant as authority on recitals are of that nature. In this case the power did not exist to donate, therefore a recital as to a subscription could not bind in donating, especially when the order called attention to in the bond showed it was intended as a donation.

The amendatory act to which attention is called in the bond also declares it in effect a donation. These were certainly enough to put any cautious person upon inquiry as to the power of this municipality to donate.

In conclusion, I think it may be said with great force that the two courts are in harmony with well-adjudicated cases in the Illinois supreme court and this Court also, and that no error appears on the record. But I take it that this Court will try to determine whether this class of cases, so numerous in the circuit courts, are to be brought here to burden this Court.